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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1933

No. 578

ALICE ASCHENBRENNER, PETITIONER,

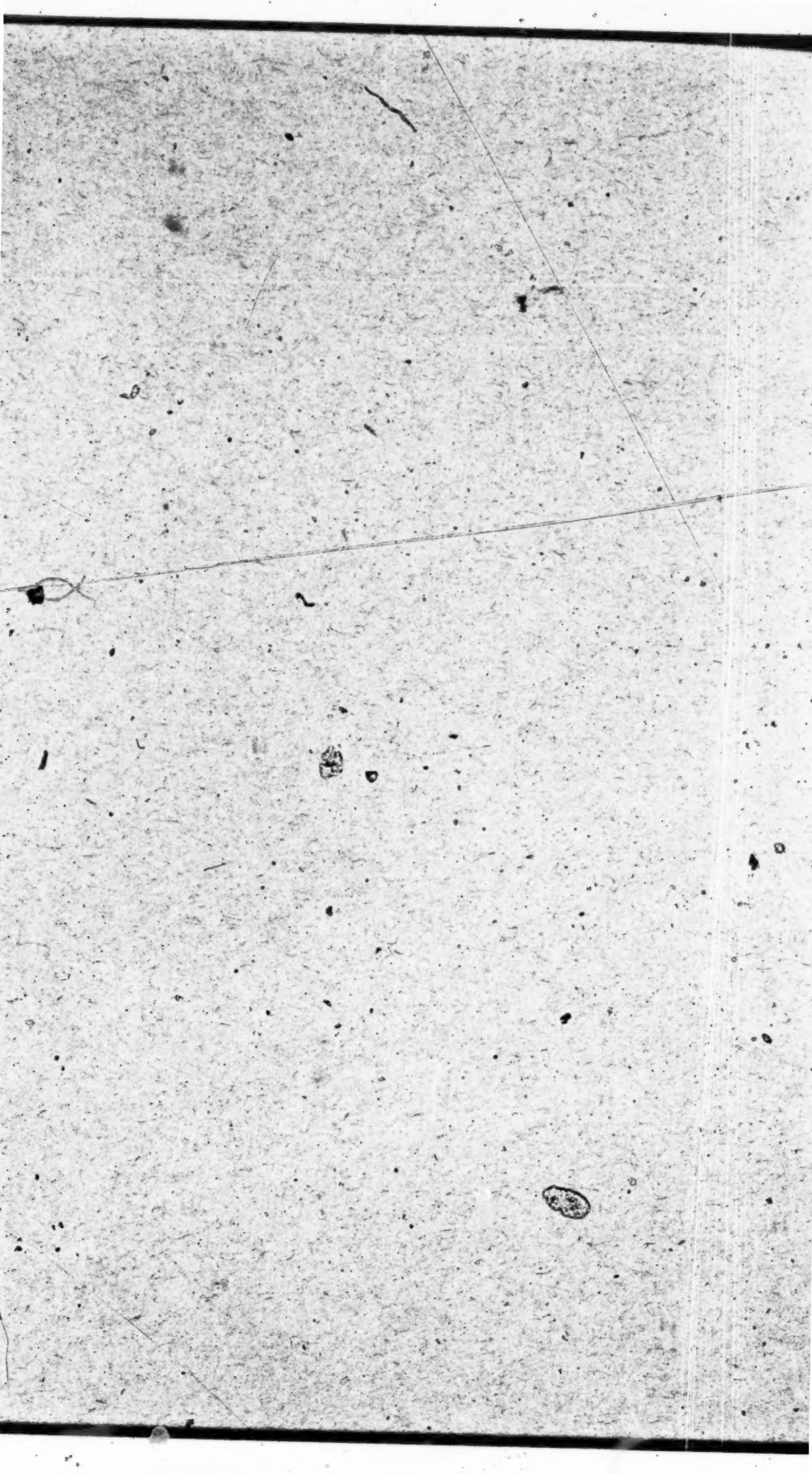
vs.

UNITED STATES FIDELITY & GUARANTY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 9, 1933

CERTIORARI GRANTED DECEMBER 11, 1933



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 578

ALICE ASCHENBRENNER, PETITIONER,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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NAMES AND ADDRESSES OF ATTORNEYS.

GEORGE A. WORK,

HORACE W. B. SMITH, Mills Building, San Francisco, California,

Attorneys for Defendant and Appellant.

WRIGHT & WRIGHT & LARSON,

JOHN RALPH WILSON,

RANDALL LARSON, Mills Building, San Francisco, California,

Attorneys for Plaintiff and Appellee.

In the Superior Court of the State of California, in and for the County of San Mateo.

No. 19,198-S

20,073

ALICE A. ASCHENBRENNER,

Plaintiff,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Defendant.

COMPLAINT.

The plaintiff complains and alleges as follows:

I.

That the defendant is a corporation organized and existing under and by virtue of the laws of Maryland.

II.

That on or about the first day of September, 1928, in the City and County of San Francisco, State of California, in consideration of the payment by insured to defendant of a premium of twenty five dollars ($25.00), defendant made and delivered to insured its written policy of insurance upon the life of said insured, Walter John Aschenbrenner, being policy numbered P. A. 47882 a copy of which is annexed hereto, marked Exhibit "A," and by this reference made a part hereof, and thereby insured the said Walter John Aschenbrenner against loss resulting directly and independently of all other causes from accidental bodily injuries, fatal or non-fatal, as in said policy provided, in the principal sum of seven thousand five hundred dollars ($7,500.00) and, by way of double indemnity, in the sum of fifteen thousand dollars ($15,000), in case of injuries sustained by the insured while a passenger in or on a public conveyance (including the platform, steps or running board thereof) provided by a common carrier for [1]* passenger service, as in said policy contained.

III.

That the said policy of insurance so issued by defendant was at all times from the first day of September, 1928, up to and including the 29th day of October, 1931, continued in full force and effect.

*Page numbering appearing at the foot of page of original certified Transcript of Record.

IV.

That on October 29, 1931, and while said policy of insurance was in force, the said insured received accidental bodily injuries while a passenger in and/or on a public conveyance provided by a common carrier for passenger service, to-wit, a northbound Southern Pacific passenger train in the County of San Mateo, State of California, and that said accidental bodily injuries so received resulted directly and independently of all other causes in the death of said insured, which said death occurred on the said 29th day of October, 1931.

V.

That the plaintiff herein is the beneficiary named in said policy of insurance.

VI.

That the plaintiff duly performed all the conditions of said policy of insurance on her part to be performed, and gave immediate notice of the death of said insured and on or about November 9, 1931, and more than sixty days prior to the commencement of this action, filed with said defendant proof of loss, as provided in said policy, and her claim thereunder, and demanded payment of the sum of fifteen thousand dollars ($15,000.00), no part of which has been paid.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of fifteen thousand dollars ($15,000.00) with interest thereon at the legal

rate from the 9th day of [2] November, 1931, together with her costs herein, and for such other and further relief as to the court may seem just.

WRIGHT & WRIGHT & LARSON,
Attorneys for Plaintiff.

State of California,
City and County of San Francisco.—ss.

Alice A. Aschenbrenner, being first duly sworn, deposes and says:

That she is the plaintiff in the foregoing action; that she has read the complaint and knows the contents thereof, and same is true of her own knowledge, except as to those matters therein stated on information or belief, and as to those matters that she believes it to be true.

ALICE A. ASCHENBRENNER.

Subscribed and sworn to before me, this 22nd day of January, 1932.

[Notarial Seal] DOROTHY H. McLENNAN,
Notary Public in and for the City and County of San Francisco, State of California.

State of California,
County of San Mateo.—ss.

I, E. B. Hinman, County Clerk of the above entitled County, and ex-officio Clerk of the Superior Court thereof, do hereby certify that the foregoing is a full, true and correct copy of the

Copy of the Application for this Policy.

I hereby apply to the United States Fidelity and Guaranty Company for a Policy to be based upon the following representation facts: I understand and agree that the right to recovery under any policy which may be issued upon the basis of this application shall be barred in the event of any one of the following statements, material either to the acceptance of the risk or to the hazard assumed by the Company is false, or in the event that any one of the following statements is false and made with intent to deceive. I agree that this application shall not be binding upon the Company until accepted either by the Secretary at the Home Office or by an agent duly authorized to issue policies.

My full name is WALTER JOHN ASCHENBRENNER

My residence is

No. 6424 Hillegass Ave., City of Oakland State of California.

I was born on the 4th day of December at Council Bluff

My age is 28 years. My height is 5 feet 7½ inches. I weigh 140 pounds. I am white.

I am with Pacific Radio Trade Assn.
(Name of Employer).

whose business is Association. Located at

905 Mission Street, City of San Francisco State of California.

My occupation is Manager

The duties of my occupation are fully described as follows: Office duties.

7. My average weekly earnings from the occupation stated above exceed the total amount of single weekly indemnity under this and all other policies carried by me, *except as follows.* No exceptions

8. Policy to be payable in case of death by accident under its provisions to { Beneficiary's Name in full ALICE A. ASCHENBRENNER
Residence Same Relationship Wife Age

9. I have no Accident Insurance or Health Insurance in this or any other Company, except as follows: No exceptions
(The name of the company and amount in each to be stated above.)

10. No application ever made by me for Accident, Health, or Life Insurance has been declined, or notice of action withheld, nor has any such policy of insurance been cancelled or renewal refused, except as herein stated: No exceptions

11. I have never received indemnity for accident or illness, except as herein stated: No exceptions

12. I have not in contemplation any special journey or any precarious undertaking, except as herein stated: No exceptions

13. My habits of life are correct and temperate; I am in sound condition mentally and physically; my hearing or vision is not impaired; I have never had nor am I now suffering from or subject to fits, disorders of the brain, or any bodily or mental infirmity or deformity (including hernia and rupture)—except as herein stated: No exceptions

14. I have not been disabled and have not received medical or surgical attention during the past five years, except as herein stated:

Date.	Ailment.	Duration.	Indemnity.	Company.
		No exceptions		

15. I have never undergone surgical operation—except as herein stated. Date No exceptions

For Result

Policy applied for this 1st day of September, 19 28

Signature of Applicant WALTER JOHN ASCHENBRENNER

STATE OF CALIFORNIA
COUNTY OF SAN MATEO, } ss.

I, E. B. Inman, County Clerk of the above entitled Court and ex-officio Clerk of the Superior Court thereof, do hereby certify that the foregoing is a full, true and correct copy of the original on file in my office, and that I have carefully compared the same with the original.

Witness my hand and seal of said Superior Court this 12 day of March 1932

E. B. INMAN
County Clerk and Ex-Officio Clerk, Superior Court

By _____ Deputy Clerk.

This Policy Provides Indemnity for Loss of Life, Limbs, Sight, Speech, Hearing or Time Due to Accidental Bodily Injuries to the Extent Herein Provided.

C 555-28

No. PA-47882

THE PILOT ACCIDENT POLICY

Homer T. Miller Co.
Insurance
Central Bank Bldg.,
Oakland

Insurance Exchange Bldg.,
San Francisco

United States Fidelity and Guaranty Company

TO

WALTER JOHN ASCHENBRENNER

_____

United States Fidelity and Guaranty Co.

BALTIMORE, MARYLAND

R. HOWARD BLAND, President

DIRECTORS

SIDNEY W. BLAND, Assistant Manager, Toronto, Canada.
J. KEMP BARTLETT, Vice-President and General Counsel.
J. KEMP BARTLETT, JR., Attorney-at-Law.
R. HOWARD BLAND, President.
J. P. BUTLER, President Canal Bank and Trust Co., New Orleans, La.
LEROY W. CAMPBELL, President The City Bank and Trust Co., Hartford, Conn.
PHILIP A. CARROLL, Shearman and Sterling, New York, N. Y.
ALLAN L. CARTER, Benzol Chemical Co.
W. F. CARTER, Carter, Jones & Turney, St. Louis, Mo.
THOMAS E. COTTMAN, President Cottman Company.
HENRY V. CUNNINGHAM, President Union Savings Bank, Boston, Mass.
E. J. CURTIS, Curtis Bros., inc., Clinton, Iowa.
E. ASBURY DAVIS, F. A. Davis & Sons.
PHILIP DE BONDE, President Oriental Navigation Co., New York, N. Y.
JOHN M. DENNIS, President Union Trust Company.
WILLIAM A. DIXON, President Dixon-Bartlett Company.
RONALD A. FOSTER, Manager, Indianapolis, Ind.
R. WALTER GRAHAM, Mayer, Fitts & Co.
FELIX E. GUNTER, President Liberty Central Trust Co., St. Louis, Mo.
SIDNEY HALL, Vice-President.
FRANK HAWKINS, Chairman of the Board Citizens and [illegible]ern Bank, Atlanta, Ga.
WALTER W. HEAD, President The Omaha National Bank, Omaha, Neb.
JAMES D. HOGE, Vice-Chairman of Board The Dexter-Horton National Bank of Seattle, Wash.
W. GEORGE HYNSON, Vice-President and Treasurer.
JOHN KENT KANE, Manager, Philadelphia, Pa.
R. CROSBY KEMPER, President City Bank of Kansas City, Kansas City, Mo.
ARTHUR E. KIRKPATRICK, Manager, Toronto, Canada.
CHARLES H. KNAPP, Attorney-at-Law.
JOSEPH R. KRAUS, Vice-President and Executive Manager Union Trust Co., Cleveland, Ohio.
WILLIAM A. LANG, W. A. Lang, inc., St. Paul, Minn.
EDWIN W. LEVERING, JR., Vice-President.
WILLIAM H. MATTHAI, President Beaver Dam Marble Co.
S. McKENNAN, President Union Bank and Trust Co., Helena, Mont.
JAMES M. MOTLEY, President Levering Coffee Co.
RUSSELL T. MOUNT, Duncan & Mount, New York, N. Y.
H. A. MULLINS, Vice-President Royal Canadian Securit[illegible]o., Winnipeg, Canada.
GURNEY E. NEWLIN, Attorney-at-Law, Los Angeles, Cal.
ALONZO GOSE OAKLEY, Manager, New York, N. Y.
CHARLES H. PHILLIPS, Vice-President.
MORTON M. PRENTIS, President First National Bank.
ROBERT C. REAM, Ream, Wrightson & Co., Inc., New York, N. Y.
JESSE B. RIGGS, Riggs, Rossmann & Hunter, Inc.
PAUL A. SEEGER, Retired.
GEO. M. SHRIVER, Senior Vice-President Baltimore & Ohio R. R.
DONALD SYMINGTON, President Baltimore Trust Co.
W. W. SYMINGTON, Vice-President and Secretary.
CHAS. E. TAYLOR, President Wilmington Savings & Trust Co., Wilmington, N. C.
J. PEMBROKE THOM, Vice-President United Railways & Electric Co.
M. BARRATT WALKER, Vice-President.
MORRIS WHITRIDGE, Whitridge, White & Co.
HENRY B. WILCOX, Vice-President First National Bank.
FRANK W. WILLIAMS, State Agent, Meridian, Miss.

STANDARD PROVISIONS.

Change of Occupation. 1. **This policy includes the endorsements and attached papers, if any, and contains the entire contract of insurance except as it may be modified by the Company's classification of risks and premium rates in the event that the Insured is injured after having changed his occupation to one classified by the Company as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the Company will pay only such portion of the indemnities provided in the policy as the premium paid would have purchased at the rate but within the limits so fixed by the Company for such more hazardous occupation.**

If the law of the State in which the Insured resides at the time this policy is issued requires that prior to its issue a statement of the premium rates and classification of risks pertaining to it shall be filed with the State official having supervision of insurance in such State then the premium rates and classification of risks mentioned in this policy shall mean only such as have been last filed by the Company in accordance with such law, but if such filing is not required by such law then they shall mean the Company's premium rates and classification of risks last made effective by it in such State prior to the occurrence of the loss for which the Company is liable.

Changes in Policy. 2. No statement made by the applicant for insurance not included herein shall avoid the policy or be used in any legal proceeding hereunder. No agent has authority to change this policy or to waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the Company and such approval be endorsed hereon.

Reinstatement of Policy. 3. If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the Company or by any of its duly authorized agents shall reinstate the policy, but only to cover loss resulting from accidental injury thereafter sustained.

Time of Notice of Claim. 4. Written notice of injury on which claim may be based must be given to the Company within twenty days after the date of the accident causing such injury. In event of accidental death immediate notice thereof must be given to the Company.

Sufficiency of Notice. 5. Such notice given by or in behalf of the Insured or beneficiary, as the case may be, to the Company at Baltimore, Md., or to any authorized agent of the Company, with particulars sufficient to identify the Insured, shall be deemed to be notice to the Company. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.

Forms for Proof of Loss. 6. The Company upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen days after the receipt of such notice the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character and extent of the loss for which claim is made.

Time for Filing Proof of Loss. 7. Affirmative proof of loss must be furnished to the Company at its said office in case of claim for loss of time from disability within ninety days after the termination of the period for which the Company is liable, and in case of claim for any other loss, within ninety days after the date of such loss.

Medical Examination. 8. The Company shall have the right and opportunity to examine the person of the Insured when and so often as it may reasonably require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.

Immediate Payment of Indemnities. 9. All indemnities provided in this policy for loss other than that of time on account of disability will be paid immediately after receipt of due proof.

Weekly Indemnity Payable in Installments. 10. Upon request of the Insured and subject to due proof of loss all of the accrued indemnity for loss of time on account of disability will be paid at the expiration of each four weeks during the continuance of the period for which the Company is liable, and any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of due proof.

To Whom Indemnities Payable. 11. Indemnity for loss of life of the Insured is payable to the beneficiary if surviving the Insured, and otherwise to the estate of the Insured. All other indemnities of this policy are payable to the Insured.

Cancellation by Insured. 12. If the Insured shall at any time change his occupation to one classified by the Company as less hazardous than that stated in the policy, the Company, upon written request of the Insured, and surrender of the policy, will cancel the same and will return to the Insured the unearned premium.

Rights of the Beneficiary. 13. Consent of the beneficiary shall not be requisite to surrender or assignment of this policy, or to change of beneficiary, or to any other changes in the policy.

Limitations of Time for Bringing Suit. 14. No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy.

The Limitations Controlled by Statute. 15. If any time limitation of this policy with respect to giving notice of claim or furnishing proof of loss is less than that permitted by the law of the State in which the Insured resides at the time this policy is issued, such limitation is hereby extended to agree with the minimum period permitted by such law.

Cancellation By Company. 16. The Company may cancel this policy at any time by written notice delivered to the Insured or mailed to his last address as shown by the records of the Company, together with cash or the Company's Check for the unearned portion of the premiums

complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character and extent of the loss for which claim is made.

Time for Filing Proof of Loss. 7. Affirmative proof of loss must be furnished to the Company at its said office in case of claim for loss of time from disability within ninety days after the termination of the period for which the Company is liable, and in case of claim for any other loss, within ninety days after the date of such loss.

Medical Examination. 8. The Company shall have the right and opportunity to examine the person of the Insured when and so often as it may reasonably require during the pendency of claim hereunder, and also the right and opportunity to make an autopsy in case of death where it is not forbidden by law.

Immediate Payment of Indemnities. 9. All indemnities provided in this policy for loss other than that of time on account of disability will be paid immediately after receipt of due proof.

Weekly Indemnity Payable in Installments. 10. Upon request of the Insured and subject to due proof of loss all of the accrued indemnity for loss of time on account of disability will be paid at the expiration of each four weeks during the continuance of the period for which the Company is liable, and any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of due proof.

To Whom Indemnities Payable. 11. Indemnity for loss of life of the Insured is payable to the beneficiary if surviving the Insured, and otherwise to the estate of the Insured. All other indemnities of this policy are payable to the Insured.

Cancellation by Insured. 12. If the Insured shall at any time change his occupation to one classified by the Company as less hazardous than that stated in the policy, the Company, upon written request of the Insured, and surrender of the policy, will cancel the same and will return to the Insured the unearned premium.

Rights of the Beneficiary. 13. Consent of the beneficiary shall not be requisite to surrender or assignment of this policy, or to change of beneficiary, or to any other changes in the policy.

Limitations of Time for Bringing Suit. 14. No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy.

The Limitations Controlled by Statute. 15. If any time limitation of this policy with respect to giving notice of claim or furnishing proof of loss is less than that permitted by the law of the State in which the Insured resides at the time this policy is issued, such limitation is hereby extended to agree with the minimum period permitted by such law.

Cancellation By Company. 16. The Company may cancel this policy at any time by written notice delivered to the Insured or mailed to his last address as shown by the records of the Company, together with cash or the Company's Check for the unearned portion of the premiums actually paid by the Insured, and such cancellation shall be without prejudice to any claim originating prior thereto.

Age Limits of Policy. 20. The insurance under this policy shall not cover any person under the age of 18 years nor over the age of 70 years. Any premium paid to the Company for any period not covered by this policy will be returned upon request.

ADDITIONAL PROVISIONS.

INJURIES NOT COVERED. 21. This policy does not cover any accidental bodily injury caused or contributed to, directly or indirectly, by sickness or disease, ~~bacteremia~~, or by ptomaines, or by war or any act of war; nor disappearance; ~~nor loss resulting from any means or act which, if used, done or self-inflicted by the Insured while in possession of all mental faculties, would be deemed intentional~~; nor loss suffered while, or resulting from riding or being in or on any aerial device or conveyance, or in falling therewith or therefrom.

SPECIFIC AND PERMANENT LOSSES. 22. No payment shall be made for more than one loss under Schedule I. Any payment made under Schedule I shall terminate this policy, which must be surrendered.

Copy of Application Part of Contract. 23. The copy of the application endorsed hereon is hereby made a part of this contract. No provision of the charter, constitution or by-laws of the Company not included herein shall avoid the policy or be used in evidence in any legal proceedings hereunder.

Renewal of Policy. 24. This policy may be renewed, subject to all of its provisions, from term to term with the consent of the Company and by the payment of the premium in advance.

IN WITNESS WHEREOF, The said Company has caused this policy to be signed by its President, and its Secretary, but the same shall not be binding upon the Company unless countersigned by a duly authorized representative.

W. W. Symmes *Secretary.*

P. Howard Bland *President.*

Dated and Countersigned at San Francisco, California. the 1st day of September 19 28

By T. Ryan *Authorized Representative.*

AVIATION RIDER

(RENEWAL FORM)

Provided the policy to which this rider is attached is one of the forms listed below, and subject otherwise to its terms, provisions and agreements, the Company will pay indemnity, to the extent of the minimum amount provided in the policy, for any loss specified therein which shall result from accidental bodily injuries while the Insured is riding as a fare-paying passenger either in a licensed passenger airplane or a licensed passenger dirigible airship, owned and provided by an incorporated passenger carrier and while operated by a licensed passenger pilot over a definitely established regular passenger route of such carrier, and between definitely established airports.

This extension shall not cover loss sustained in any airplane or dirigible airship while it is being used for flights over water in excess of 100 miles, or more than 50 miles from land, sight-seeing or special or chartered flights, or in any military or naval airplane or dirigible, or in any form of aviation travel or hazard not hereinbefore specified, nor shall it cover injuries sustained by any person riding on a pass, or while acting as a pilot, mechanic or member of crew of an airplane or dirigible.

Nothing herein contained shall entitle the Insured for any such loss to the double, or other multiple indemnity, if any, specified in any such policy.

This rider is valid only when attached to and forming part of one of the following policy forms:

Cas.	1	Cas.	28	A&H.	43	A&H.	244
"	2	"	29	"	47	"	300
"	17	"	36	"	64	"	705
"	18	"	40	"	178	"	706
"	19	"	41	"	237	"	725
"	27	"	42	"	243	"	726

This rider takes effect upon the date of issuance on or after April 1st, 1929, and is substituted for Policyholder's letter, form A. & H.-319, which is hereby made null and void.

Attached to and forming part of Policy No. PA-47882 *Issued by the* UNITED STATES FIDELITY AND GUARANTY COMPANY, *of Baltimore, Maryland.*

To WALTER JOHN ASCHENBRENNER *of* OAKLAND, CALIF.

Dated at SAN FRANCISCO, CALIF. *this* 1st *day of* SEPTEMBER *19* 29

W W Symington
SECRETARY

P Norman Bland
PRESIDENT

Countersigned.....
Authorized Representative.

A. & H. 382 40M 4-8-29 ★

Made in U. S. A.

EARTHQUAKE INDEMNITY RIDER.

It is hereby understood and agreed taat Schedule V, captioned "Double Indemnities" in this policy, is extended by the addition of the following clause: —

"IN CONSEQUENCE OF EARTHQUAKE"

In other respects, the terms, limits. and conditions of this policy remain unchanged.

Attached to and forming part of Policy No. PA-47882 *Issued by the UNITED STATES FIDELITY AND GUARANTY COMPANY, of Baltimore, Maryland.*

To WALTER JOHN ASCHENBRENNER *of* OAKLAND, CALIF.

Dated at SAN FRANCISCO, CALIF. *this* 1st *day of* SEPTEMBER *19*28

W W Symington
SECRETARY

P Howard Bland
PRESIDENT

Countersigned V. Dixon

OPTIONAL GRADUATE NURSE RIDER

If "such injury" to, if the policy to which this rider be attached is an Accident policy, or if "such injury" to, or "such sickness" of the Insured, if the policy to which this rider be attached is a Disability Policy, shall necessitate the employment by the Insured of a registered graduate nurse, the Company will pay, in addition to any other indemnity to which the Insured may be entitled, excepting "SURGICAL OPERATIONS," Schedule VII, or "HOSPITAL EXPENSES," Schedule VIII, for the period not exceeding eight consecutive weeks, the amount per week actually expended by the Insured for graduate nurse expenses, but not exceeding the single weekly indemnity granted under this policy, nor exceeding $50.00 a week, if the single weekly indemnity under this policy is in excess of $50.00 a week, and proportionately for any period of employment for less than one week.

Attached to and forming part of Policy No. PA-47882 ***issued by the UNITED STATES FIDELITY AND GUARANTY COMPANY, of Baltimore, Maryland,***

To WALTER JOHN ASCHENBRENNER ***of*** OAKLAND, CALIF.

Dated at SAN FRANCISCO, CAL ***this*** 1st ***day of*** SEPTEMBER ***19*** 28

W W Symington
SECRETARY

P Howard Bland
PRESIDENT

A. & H. 20. 1-30-30 10M

Countersigned .....
Authorized Representative.

Made in U. S. A.

SUIC

It is Hereby Understood and Agreed th
act which, if used, done or self-inflicted by the I
deemed intentional" appearing in ADDITIO
COVERED, in this policy, is eliminated and the

NOR SUICIDE, SANE OR I

In other respects the terms, limits and condi

Attached to and forming part of Policy
FIDELITY AND GUARANTY COMPANY,

To WALTER JOHN ASCHENBRENNER

Dated at SAN FRANCISCO, CAL. *this*

W W Symington

SECRETARY

Countersigned

A. & H. 192 1-28-28 2M

UICIDE RIDER

) that the clause reading "Nor loss resulting from any means or e Insured while in possession of all mental faculties, would be TIONAL PROVISION 21, sub-captioned INJURIES NOT the following clause is substituted in lieu thereof:

R INSANE, OR ANY ATTEMPT THEREAT.

onditions of this policy remain unchanged.

icy No. P.A.-47882 *issued by the UNITED STATES Y, of Baltimore, Maryland,*

of OAKLAND, CALIF.

1st *day of* SEPTEMBER *19*28

P. Howard Bland
PRESIDENT

V. Owen
Authorized Representative.

Made in U. S. A.

Schedule IV. **OPTIONAL INDEMNITIES.**

Or, if "such injury" is one set forth in this schedule, and the Insured so elects in writing within twenty days from the date of the accident, he may take, in lieu of all other indemnity, except as provided under Schedule VII, the amount specified for "such injury" in this schedule, provided that not more than one such indemnity shall be payable as the result of any one accident; and provided always, that the amounts specified herein shall be payable only in case the Weekly Indemnity is $35.00; if such weekly indemnity is greater or less than $35.00, then the amount to be paid shall be increased or reduced proportionately.

For Loss—	
Of one or more Entire Fingers	$150
Of one or more Entire Toes	300
For Complete Dislocation—	
Of the Shoulder	100
Of the Elbow	100
Of the Wrist	125
Of the Hip	300
Of the Knee	150
Of two or more Bones of Foot (not toes)	150
Of the Ankle	150
Of two or more Toes	50
Of two or more Fingers	50
For Complete Fracture—	
Of the Skull, both Tables	325
Of the Lower Jaw	80

For Complete Fracture—	
Of the Collar Bone	$160
Of the Pelvis	250
Of the Thigh	300
Of the Leg (Tibia and Fibula)	200
Of the Leg (one bone)	100
Of the Knee Cap	200
Of the Arm, between Elbow and Shoulder	160
Of the Arm, between Wrist and Elbow (both bones)	160
Of the Arm, between Wrist and Elbow (one bone)	100
Of two or more Ribs	100
Of the Foot (two or more bones—not toes)	125
Of the Hand (two or more bones—not fingers)	125
Of two or more Toes	100
Of two or more Fingers	100
Of the Scapula (Shoulder Blade)	160

Schedule V. **DOUBLE INDEMNITIES.**

The amounts payable in all the foregoing Schedules shall be doubled if "such injury" is sustained by the Insured,

(1) While a passenger in or on a public conveyance (including the platform, steps, or running board thereof) provided by a common carrier for passenger service.

(2) While in a passenger elevator (excluding elevators in mines).

(3) In consequence of the destruction, by fire, of a building while the Insured is therein, (excluding firemen on duty).

(4) In consequence of being struck by lightning.

(5) In consequence of the collapse of the outer walls of a building while the Insured is therein.

(6) In consequence of the explosion of a steam boiler.

(7) In consequence of a cyclone or tornado.

Schedule VI. **NON-DISABLING INJURY INDEMNITY.**

Or, if "such injury" shall not disable the Insured or entitle him to any other indemnity under this policy, but shall require immediate medical or surgical attention, the Company will reimburse him for the cost of such treatment in an amount not to exceed the single Weekly Accident Indemnity for one week, provided that the attending physician's or surgeon's receipt is filed with the Company within ~~ninety~~ thirty days from date of accident.

Schedule VII. **SURGICAL OPERATIONS.**

If "such injury" to the Insured shall, within Ninety days from the date of the accident necessitate a surgical operation named in this schedule, the Company will pay, in addition to any other indemnity herein provided, the sum named for such operation in the Schedule of Surgical Operations; provided that not more than one such operation indemnity shall be payable as the result of any one cause of disability, and such operation indemnity may be subject to the election of the Insured; and provided always, that the amounts specified herein shall be payable only in case the Weekly Indemnity is $35.00; if such weekly indemnity is greater or less than $25.00 then the amounts to be paid shall be increased or reduced proportionately. Reimbursement will not be made for any operation which is necessitated by a disease or bodily condition contracted or existing prior to the issue of this policy.

AMPUTATION OF—	
Foot, Hand or Forearm	$ 25
Leg, at or above knee	50
Arm, above elbow	50
Thigh, involving hip joint	100
Fingers, one or more entire	10

REDUCTION OF FRACTURE OF—	
Wrist or Hand	$ 15
Fingers, one or more	10
Pelvis or Sacrum, any of the bones of	50
Coccyx	10
Thigh	75

(5) In consequence of the collapse of the outer walls of a building while the Insured is therein.

(6) In consequence of the explosion of a steam boiler.

(7) In consequence of a cyclone or tornado.

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AMPUTATION OF—	
Foot, Hand or Forearm	$ 25
Leg, at or above knee	50
Arm, above elbow	50
Thigh, involving hip joint	100
Fingers, one or more entire	10
Toes, one or more entire	10
REDUCTION OF DISLOCATION OF—	
Shoulder, Elbow, Hip, Knee or Ankle	25
Wrist or Lower Jaw	15
Fingers, one or more	10
EXCISION OF—	
Shoulder, Hip or Knee-Joint	100
Elbow, Wrist or Ankle-Joint	50
Eye	50
REDUCTION OF FRACTURE OF—	
Lower Jaw, Collar Bone, or Shoulder Blade	25
Breast Bone or Nose	10
Rib or Ribs	10
Rib or Ribs (resection)	50
Upper Arm	25
Forearm, one or both bones	25

REDUCTION OF FRACTURE OF—	
Wrist or Hand	$ 15
Fingers, one or more	10
Pelvis or Sacrum, any of the bones of	50
Coccyx	10
Thigh	75
Knee Cap (open operation)	50
Knee Cap (Fixation)	25
Leg Bone (one)	25
Leg Bones (both)	50
Foot, two or more bones, not toes	15
Toes, one or more	10
LAPAROTOMY (opening of the abdominal cavity for an operation on any organ contained therein)	100
INCISION FOR—	
Synovitis (inflamation of the lining membrane of a joint)	25
HYDROPHOBIA, Pasteur Treatment	50
GUNSHOT WOUNDS (not necessitating amputation or Laparotomy)	25
SKULL TREPHINING for fracture	100
SUTURING WOUNDS	5

Schedule VIII. **HOSPITAL EXPENSES.**

If "such injury" to the Insured shall, within ninety days from the date of commencement of disability therefrom necessitate his removal to a hospital, the Company, provided no claim is made under Schedule VII thereof, will pay, (in addition to the indemnity otherwise provided), for the period not exceeding Fifteen weeks during which the Insured shall be necessarily confined in the hospital, the amount expended by him weekly for hospital expenses, but not exceeding per week, the amount payable hereunder as single Weekly Indemntiy.

Schedule IX. **IDENTIFICATION INDEMNITY.**

If "such injury" shall render the Insured physically unable to communicate with friends, the Company will, upon receipt of a telegram or other message giving this policy number, immediately transmit to the relatives or friends of the Insured any information respecting him, and will defray all expenses, not exceeding One Hundred Dollars (in addition to any other indemnity herein provided), necessary to put the Insured in communication with and in care of friends.

TH. PILOT ACCIDENT OLICY.

This Policy Provides Indemnity for Loss of Life, Limbs, Sight, Speech, Hearing or Time Due to Accidental Bodily Injuries to the Extent Herein Provided.

UNITED STATES FIDELITY AND GUARANTY COMPANY

BALTIMORE, MD.

(HEREINAFTER CALLED THE COMPANY)

C 555-28

No. PA-47882

In Consideration of the premium of - - - - - $25.00 - - - - - Dollars, and of the statements in the application for this policy, copy of which is endorsed hereon and made a part hereof, and subject to all the provisions and limitations hereinafter contained and endorsed hereon,

Does Hereby Insure WALTER JOHN ASCHENBRENNER (Hereinafter called the Insured.)

by occupation MANAGER, PACIFIC RADIO TRADE ASSOCIATION. - OFFICE DUTIES. - - - - - Classed as SELECT

in the Principal Sum of SEVEN THOUSAND FIVE HUNDRED AND NO/100 ($7500.00) - - - - - - - - - - - - - - - - Dollars;

and for a Weekly Accident Indemnity of TWENTY FIVE AND NO/100 ($25.00) - Dollars,

for the term of TWELVE months, from the FIRST day of SEPTEMBER 1928, beginning and ending at 12 o'clock noon, Standard Time, at the place where the Insured resides,

(1) Against loss, as hereinafter defined, resulting directly, and independently of all other causes from accidental bodily injuries fatal or non-fatal, being hereinafter referred to as "such injury," as follows:

DEATH, DISMEMBERMENT, LOSS OF SIGHT, SPEECH OR HEARING.

Schedule I.

(a) If "such injury" shall continuously and wholly disable the Insured from date of accident from performing every kind of duty pertaining to his occupation, and during the period of such disability, shall result in one of the losses specified under **Specific Losses**, the Company will pay the sum set opposite such loss;

(b) Or, if within six months from the date of accident, irrespective of total disability, "such injury" shall directly result as aforesaid, in one of the losses specified under **Specific Losses**, the Company will pay the sum set opposite such loss, and

In Addition the Weekly Accident Indemnity as provided in Schedule II between the date of accident and date of such loss; provided further, that not more than one of the amounts (the greater) named under **Specific Losses** shall be payable for injuries resulting from one accident.

SPECIFIC LOSSES.

Loss of Life	The Principal Sum
Both Hands by actual separation at or above wrists	The Principal Sum
Both Feet by actual separation at or above ankles	The Principal Sum
One Hand and One Foot by actual separation at or above wrist and ankle	The Principal Sum
Entire Sight of Both Eyes if irrecoverably lost	The Principal Sum

DEATH, DISMEMBERMENT, LOSS OF SIGHT, SPEECH OR HEARING.

Schedule I.

(a) If "such injury" shall continuously and wholly disable the Insured from date of accident from performing every kind of duty pertaining to his occupation, and during the period of such disability, shall result in one of the losses specified under **Specific Losses**, the Company will pay the sum set opposite such loss;

(b) Or, if within six months from the date of accident, irrespective of total disability, "such injury' shall directly result as aforesaid, in one of the losses specified under **Specific Losses**, the Company will pay the sum set opposite such loss, and

In Addition the Weekly Accident Indemnity as provided in Schedule II between the date of accident and date of such loss; provided further, that not more than one of the amounts (the greater) named under **Specific Losses** shall be payable for injuries resulting from one accident.

SPECIFIC LOSSES.

Loss of Life		The Principal Sum
Both Hands by actual separation at or above wrists		The Principal Sum
Both Feet by actual separation at or above ankles		The Principal Sum
One Hand and One Foot by actual separation at or above wrist and ankle		The Principal Sum
Entire Sight of Both Eyes if irrecoverably lost		The Principal Sum
Entire Sight of One Eye, if irrecoverably lost, and One Hand at or above the wrist by severance		The Principal Sum
Entire Sight of One Eye, if irrecoverably lost, and One Foot at or above the ankle by severance		The Principal Sum
Speech and Hearing, if entire and irrecoverable		The Principal Sum
One Leg by actual separation at or above knee	Two-thirds	The Principal Sum
One Arm by actual separation at or above elbow	Two-thirds	The Principal Sum
One Hand by actual separation at or above wrist	One-half	The Principal Sum
One Foot by actual separation at or above ankle	One-half	The Principal Sum
Speech or Hearing if entire and irrecoverable	One-half	The Principal Sum
Entire Sight of One Eye if irrecoverably lost	One-third	The Principal Sum
Permanent Stiff or Rigid Elbow and Knee Joints	One-sixth	The Principal Sum
Thumb and Index Finger of Either Hand by actual separation at or above metacarpo-phalangeal joints	One-sixth	The Principal Sum
Permanent Stiff or Rigid Elbow or Knee Joint	One-twelfth	The Principal Sum

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Schedule II. INDEMNITY FOR TOTAL OR PARTIAL DISABILITY

TOTAL LOSS OF TIME. Of, if "such injury" shall not result in any of the losses mentioned in Schedule I, but shall cause continuous total disability, and prevent the Insured from date of accident, from performing any and every duty pertaining to his occupation, the Company will pay him the weekly Accident indemnity above specified, for the period of such disability.

PARTIAL LOSS OF TIME. Or, if "such injury" shall from the date of accident or immediately following total disability, prevent the Insured from performing one or more material duties pertaining to his occupation, the Company will pay one-half of the above specified weekly Accident indemnity for the period of such continuous partial disability, but not to exceed a period of fifty-two consecutive weeks. Weekly indemnity will not be payable under the provisions of Schedule I except as therein stated.

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original on file in my office, and that I have carefully compared the same with the original.

Witness my hand and seal of said Superior Court this 9th day of March, 1932.

[Seal] E. B. HINMAN,
County Clerk and Ex-Officio Clerk,
Superior Court
By F. M. RYAN,
Deputy Clerk. [3]

Photostats of pages [4-7] inserted opposite.

State of California,
County of San Mateo.—ss.

I hereby certify that Summons were issued on January 23, 1932, by Laura F. Collins, Deputy Clerk, in the action entitled "Alice A. Aschenbrenner v. United States Fidelity and Guaranty Company, a corporation, No. 20,073.

Dated, March 3rd, 1932.

[Seal] F. M. RYAN,
Deputy County Clerk and ex-officio Deputy Clerk of the Superior Court of the State of California, in and for the County of San Mateo.

[Endorsed]: Filed Mar. 16, 1932. [8]

[Title of Court and Cause.]

ANSWER.

Comes now defendant, and in answer to the complaint admits, denies, and alleges, as follows:

I.

Answering paragraph IV of the complaint, defendant denies, both generally and specifically, conjunctively and disjunctively, each, all and every allegation in said paragraph of said complaint contained.

WHEREFORE, defendant prays that the complaint herein be dismissed, with costs.

HORACE W. B. SMITH,
GEO. A. WORK,
Attorneys for Defendant. [9]

State of California,
City and County of San Francisco.—ss.

Edwin C. Porter, being first duly sworn, deposes and says: That he is an officer, to-wit, Resident Vice-President, of the United States Fidelity and Guaranty Company, the defendant above named, and as such officer is authorized to verify pleadings on behalf of said corporation; that he has read the foregoing answer, and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated upon information or belief, and as to those matters, he believes it to be true.

EDWIN C. PORTER.

Subscribed and sworn to before me this 15th day of April, 1932.

[Seal] MARIE FORMAN,
Notary Public in and for the City and County of San Francisco, State of California.

and receipt of a copy of the within Answer is hereby admitted this 15th day of April, 1932.

WRIGHT & WRIGHT & LARSON,
Attorneys for Plaintiff.

[Endorsed]: Filed Apr. 15, 1932. [10]

[Title of Court and Cause.]

VERDICT.

We, the Jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of fifteen thousand dollars and interest at 7% from and after Nov. 9, 1931.

($)

Dollars. 15,000.00

FRANK A. BOGART,
Foreman.

[Endorsed]: Filed Nov. 23, 1932. [11]

In the Southern Division of the United States District Court for the Northern District of California.

No. 19,198-S

ALICE A. ASCHENBRENNER,

Plaintiff,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Defendant.

JUDGMENT ON VERDICT.

This cause having come on regularly for trial on the 22nd day of November, 1932, being a day in the November 1932 term of said Court, before the Court and a jury of twelve men duly impaneled and sworn to try the issues joined herein; Randall Larson and John Ralph Wilson, Esquires, appearing as attorneys for plaintiff, and George A. Work and Horace W. B. Smith, Esquires, appearing as attorneys for defendant, and the trial having been proceeded with on the 23rd day of November, in said year and term, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the jury and the jury having subsequently rendered the following verdict, which was ordered recorded, namely: "We, the jury, find in favor of the plaintiff and

assess the damages against the defendant in the sum of fifteen thousand dollars and interest at 7% from and after Nov. 9, 1931, dollars 15,000.00. Frank A. Bogart Foreman.", and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Alice A. Aschenbrenner, plaintiff, do have and recover of and from United States Fidelity and Guaranty Company, a corporation, the sum of sixteen thousand ninety and 83/100 dollars ($16,090.83), together with her costs herein expended taxed at $

Judgment entered this 23rd day of November, 1932.

WALTER B. MALING,
Clerk. [12]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 22nd day of November, 1932, at the November term of the District Court of the United States for the Northern District of California, Southern Division, the above entitled cause came on for trial before a jury, and thereafter a jury was impanelled and sworn to try said cause, and the trial commenced on the 22nd day of November, 1932, Wright,

Wright & Larson and John Ralph Wilson, Esqs., appearing for the plaintiff, and Horace W. B. Smith and George A. Work by George A. Work, appearing for the defendant.

ALICE ATWOOD ASCHENBRENNER,

called as a witness, in her own behalf, was duly sworn and testified as follows: I am the plaintiff in this case and the widow of Walter John Aschenbrenner.

Mr. WILSON.—Q. What was Mr. Aschenbrenner's age at the time of his death?

A. He was 41.

Q. What was his height, Mrs. Aschenbrenner.

A. Five feet nine and a half, I should judge, about my height.

Q. What was his weight?

A. 145 or 48.

Q. What was his condition of health for a year or two prior to the accident?

A. It had always been perfect.

Q. Was he an active man?

A. Very active.

Q. Physically, of course?

A. Yes. [13]

Whereupon, counsel for the plaintiff offered in evidence the policy of insurance which is the subject matter of this action, called The Pilot Accident Policy, issued by the United States Fidelity &

Guaranty Company. The due execution of the policy as set forth in the complaint, and that it was binding upon the defendant, United States Fidelity & Guaranty Company, according to its terms, was admitted by the attorneys for the defendant.

The attorneys for the defendant further admitted that the single indemnity amount provided for in the policy, to-wit, $7,500.00, was due to the plaintiff and had been due to her since the date of the death of the assured therein, Walter John Aschenbrenner, on the 29th day of October, 1931, but denied that the plaintiff was entitled to the payment of the so-called double indemnity of the policy, to-wit, the sum of $7,500.00 additional, and the testimony at the trial was addressed to the issue concerning the double indemnity amount solely.

That the material provisions of the insurance policy are as follows: The defendant, United States Fidelity & Guaranty Company, does insure Walter John Aschenbrenner (the deceased) in the principal sum of $7,500.00 (1) against loss, as in said policy defined, resulting directly, and independently of all other causes from accidental bodily injuries, fatal or non-fatal, being hereinafter referred to as "such injury," as follows: Loss of life, the principal sum. The policy further provides:

"Schedule V. Double Indemnities.

The amounts payable in all the foregoing schedules shall be doubled if 'such injury' is sustained by the insured,

(1) While a passenger in or on a public conveyance (including the platform, steps, or running board thereof) provided by a common carrier for passenger service." [14]

It is admitted that the train, in connection with his efforts to board which the assured met his death, was at the time a public conveyance provided by a common carrier for passenger service, the sole question being whether at the time the assured sustained the accidental injuries resulting in his death he was a passenger in or on the train involved. The plaintiff to sustain the issue on her part called as a witness in her behalf,

CHARLES A. BAKER,

a bank teller in the employ of the Wells Fargo Bank & Union Trust Company in San Francisco. He testified in substance as follows:

He resided in October, 1931, on Balboa Avenue in Burlingame; he saw an accident on the morning of October 29, 1931, at the Broadway Station in Burlingame. He did not know Mr. Aschenbrenner. He was about a block away from the station at the time on Broadway and Chula Vista. That he saw the platform of the Southern Pacific Station from where he was standing and saw a taxicab pull up near the train and two gentlemen get out of the

(Testimony of Charles A. Baker.)

taxicab and run for the train. They were quite close together all the way to the train. That the train had just started when they alighted from the taxicab. Seeing them run to the train attracted his attention to them. He could not drop his eyes when he saw the two men running for the train; he was afraid something might happen. The men were close together and by the time they got to the train it was going at a pretty good clip. That Mr. Aschenbrenner, the man who got on the train, was to the right of the other man, and that it was the witness' impression that he, Aschenbrenner, boarded the train and swung on the steps. That he saw the man get on the train and that the other gentleman was quite close to him when he, Aschenbrenner, was on the steps of the train. That as he reached the other gentleman standing they ran together. Mr. [15] Aschenbrenner lost his control and had hold with his right hand on the train, and it knocked him back against the train with his back against it; he lost his hold completely and fell under the train.

Cross-examination.

Mr. WORK.—The train was going west at the time, towards San Francisco.

A. Yes sir.

Q. You say that you were a block away from it at the time this took place, is that right?

(Testimony of Charles A. Baker.)

A. Yes, sir; I imagine that it would be 300 or 400 feet that he was away from the train.

Q. Now, you saw Mr. Aschenbrenner grab ahold with his right hand, did you?

A. Yes, sir.

Q. Did you see him get ahold with his left hand.

A. No, sir.

Q. He didn't get ahold with his left hand, is that right?

A. No.

Q. Did he get both feet on the lower step?

A. From where I was it looked like he had both feet on the step.

Q. It looked to you that he had both feet on the lower step?

A. Yes, sir.

The COURT.—Could you see the lower step?

A. Yes, sir.

The COURT.—Tell the jury exactly what you saw.

A. From where I was he was on the lower step.

Q. Would you say that you saw him on the lower step?

A. Yes, sir.

Mr. WORK.—Did he have both feet on the lower step?

A. Yes.

Q. How far did the train move after he had both feet on the lower step, would you say, before he fell off?

(Testimony of Charles A. Baker.)

A. Well, it was about a quarter of the length of the car. [16]

Q. Just about a quarter length of the car?

A. Yes, sir.

Q. I understood you to say that the train was going at the time at a pretty good clip.

A. Yes, sir.

Q. Would you say ten miles an hour, or could you make any estimate?

A. It is hard to judge, but it's too fast for a man to attempt to get on.

Q. That impressed you at the time?

A. Yes, sir, that was why I was watching so intently.

Q. After he had gone about this quarter length of the car on the steps there, he swung back against the side of the coach, did he?

A. It brought him up to where the other gentleman was; they were in close contact there and he swung around with his back toward the coach.

Q. Then he fell instantly after touching the other man?

A. The man lost control of himself and could not swing around again and then fell down."

That it was a dry, clear morning, about 7:35 A. M.

MALCOLM P. BUTTON

was then called as a witness for the plaintiff and testified that he resided in Burlingame in October, 1931, and still resides there. That he operated a service station on the corner of California Drive and Broadway in Burlingame. That California Drive runs paralled to the Southern Pacific Railroad at that point, and that it was about 120 or 130 feet from the easterly curbstone of California Drive to the westerly track of the Southern Pacific Railroad. That the station platform extended on both sides of Broadway. That there were no obstructions on the platform north of Broadway at the time of the accident. That the railroad roadbed was some six inches or eight inches higher than California Drive. That the platform at the railroad station consisted of a short strip [17] of concrete, but chiefly of crushed rock and gravel. That the lowest step on the train was above the level of the platform. That on the 29th of October, 1931, he saw Mr. Aschenbrenner atttempting to board a train. That he saw the taxi arrive at the station; that the witness was standing just outside his service station. That he saw Mr. Aschenbrenner running to board the train on the north side of Broadway.

Q. Where was it that Mr. Aschenbrenner was running to board the train, on the north side or the south side of Broadway?

A. On the north side of Broadway.

Q. Where did the taxicab stop?

(Testimony of Malcolm P. Button.)

A. The taxicab stopped on the left hand side of Broadway; it turned into the left hand side of Broadway and stopped.

Q. At the time the taxicab stopped was there a train standing in the station?

A. Yes, it just started to move at that time.

Q. Just started to move at that time? When?

A. When the cab stopped.

Q. How far did the cab stop in back of the train, away from the train?

A. The side of the train? I imagine it was ten or fifteen feet. No, it would be further than that, because there is another track in there: twenty or twenty-feet possibly.

Q. This train was on the most westerly track, the train nearest to you?

A. No, sir.

Q. The easterly track?

A. The right hand track.

Q. How many people got out of the taxicab?

A. Two gentlemen.

Q. Did you know either one at that time?

A. No, sir.

Q. Did you know afterwards that one was Mr. Aschenbrenner? [18]

A. I heard after the accident that was his name.

Q. Just state what the two men did?

A. Well, the cab stopped and they both got out of the left hand side of the taxicab and they hesi-

(Testimony of Malcolm P. Button.)

tated just a moment; then started toward the train which was in motion at that time, and I would say they ran about half of the car length. Ar. Aschenbrenner was on the right hand side and the gentleman with him was on his left, this way, running side by side toward the front end of this coach. The gentleman on the left apparently was going to catch the rear end, about the third to the last car on the train, and Mr. Aschenbrenner had a brief case in his right hand and an overcoat over his left arm and he boarded the front end of the second to the last coach on the train, and he grabbed the rail with his right hand and after he was on he stopped and apparently started to change hands with his overcoat or brief case, and there was some confusion between the brief case and his overcoat, and this gentleman that started to jump on the other platform, he had stopped; they apparently were right together then when Mr. Aschenbrenner fell.

Q. You say Mr. Aschenbrenner attempted to board the front platform and the other man the rear platform, was that of the car ahead?

A. Yes.

Q. How many feet did Mr. Aschenbrenner have on the train?

A. He had both feet on the train.

Q. Both feet?

A. Yes, sir.

(Testimony of Malcolm P. Button.)

Cross-examination.

Mr. WORK.—How far had the train gone before Mr. Aschenbrenner fell off?

A. Possibly half a car length.

Q. Approximately how long are those cars?

A. I think they're around sixty feet. [19].

Q. Did Mr. Aschenbrenner take hold of the left hand hold with his left hand?

A. No, sir.

Q. He did not?

A. No, sir.

Q. He took ahold of only the right hand hold with his right hand?

A. Yes, sir.

Q. Are your sure that he had both feet on the lower step?

A. Yes, sir.

Q. What specially called your attention to that fact, if anything?

A. Well, he was, was standing there.

Q. You say he was trying to change his overcoat from one hand to the other?

A. That was my impression.

Q. Did you see him do anything with his arm?

A. I saw a motion there with that arm that the overcoat was on. That was my idea at the time that he was possibly trying——

Q. If that is only your conclusion about it you didn't see him actually put the overcoat from one arm to the other?

(Testimony of Malcolm P. Button.)

A. Didn't change arms.

Q. This thing happened very quickly, didn't it?

A. Yes, sir.

Q. Were you looking right at Mr. Aschenbrenner and this platform while all this was taking place?

A. Yes, sir.

Q. How many feet would you say you were away from the platform when Mr. Aschenbrenner jumped on?

A. It would be around a hundred and twenty or thirty feet.

Q. How fast would you say the train was going at the time?

A. That is pretty hard to tell; I would say eight or ten miles an hour.

Q. As I understand you to say, the man with Mr. Aschenbrenner was to his left, was to Mr. Aschenbrenner's left?

A. Yes, sir. [20].

Q. That is looking at them from behind, is that right?

A. Yes, sir.

Q. Obviously, therefore, Mr. Aschenbrenner was to this man's right?

A. Yes, sir.

Q. How far apart would you say they were.

A. Possibly a foot, maybe two feet apart.

Q. Did the other man make any contact with the train at all?

(Testimony of Malcolm P. Button.)

A. No, sir.

Q. How far was the other man from Mr. Aschenbrenner when Mr. Aschenbrenner fell off?

A. He seemed right— by that time he stopped and seemed to be right at the spot where Mr. Aschenbrenner fell.

Q. Did the other man run along the train as the train proceeded or did he stop before he got to the train?

A. I don't quite understand.

Q. I will ask you this: Did they run at right angles to the train, then run along beside it or go diagonally toward the train?

A. Sort of diagonally at first, then parallel with the train.

Q. How far along and parallel to the train did Mr. Aschenbrenner run before he got to take ahold of it?

A. It was just a few feet; I imagine ten feet or less.

Q. How far along did the other man run with him?

A. The other man was slightly in advance of him by the time he was up to the rear door of the other coach.

Q. How far?

A. Three feet.

Q. Did the other man keep ahead of Mr. Aschenbrenner as they ran up beside the train?

A. No, sir, they were side by side.

(Testimony of Malcolm P. Button.)

Q. About side by side then, paralleling the train, is that [21] right?

A. Yes, sir.

Q. Did the other man brush Mr. Aschenbrenner or did Mr. Aschenbrenner brush him as Mr. Aschenbrenner got on the train?

A. Not as he got on the train I don't believe; because he was ahead of him when Mr. Aschenbrenner got on the train.

Q. Mr. Aschenbrenner was ahead of the other man?

A. No, sir, the other man was ahead of him.

Q. What I am asking you is, did they come in contact at or about the time that Mr. Aschenbrenner got on the step?

A. I didn't say that they came in contact.

Q. You didn't say they came together at all?

A. No, I didn't see them.

Q. Did you see Mr. Aschenbrenner swing back against the side of the coach holding on with his right hand to the right hand hold?

A. Yes, and swing slightly back, then drop.

Q. And that took place while the car was going probably a half a car length, that is your judgment of the distance at any rate, is that right?

A. Yes, sir.

WILLIAM J. McCAULEY

was then called as a witness for the plaintiff. He testified that he lived at 511 California Drive, Burlingame, in October, 1931; that he was a taxicab driver at that time. That he called at the house of Mr. Aschenbrenner on the morning of October 29, 1931, and picked up Mr. Aschenbrenner and his friend and took them down to the train, arriving at about 7:35 A. M. A train had just pulled in when he arrived. He stopped his cab on Broadway about twenty feet from the westerly tracks and he was facing the train. When he stopped his car the train was just beginning to pull out of the station. The passengers got out and Mr. Aschenbrenner started to reach for the money to pay him and he told Aschenbrenner he could pay later, and both men ran for the train, running north parallel with the tracks. They went on somewhat of an angle. That he [22] saw Aschenbrenner board the train; that he was about forty feet away at the time. That the train was moving between seven and eight miles per hour at the time. That Mr. Aschenbrenner made an attempt to get on to the train; he jumped on the lower step and was hanging with one hand. That he, the witness, did not see Mr. Aschenbrenner's left hand and could not see whether he held with that hand, but it was his impression that he did not because he had an overcoat on that arm. That he rode on the train for a distance of about twenty feet with his feet on the lower step. That Mr. Aschenbrenner's friend was about two feet

(Testimony of William J. McCauley.)

ahead of him and was running along with the side of the train, but he did not notice what the man was doing at the time. That the vestibule door of the train was open at the time that Aschenbrenner took hold of the train. That Mr. Aschenbrenner had both feet on the train.

Cross-examination
by Mr. Work.

Q. There is no other reason than that you watch people run for trains ordinarily, is that right?

A. Yes, sir.

Q. I will ask you this: Did you watch Mr. Aschenbrenner run for the train because at that time you thought the train was going too fast for him to board it?

A. No, sir. It was not moving. I think he could have made it; he should have made it. I don't know—in fact he did get on; I don't know why he didn't stay on.

Q. Did you see anybody push him off?

A. No, sir.

Q. Did he stumble?

A. No.

Q. What was it that made him fall off? As far as you saw?

A. His coat, I would say.

Q. All right. What did his coat do to him that made him [23] fall off?

(Testimony of William J. McCauley.)

A. Why, I think the wind probably caught his coat.

Q. Well, now, Mr. McCauley, I am not asking for your conclusions, I am asking for what you saw. You said his coat made him fall off?

A. Yes.

Q. What was it about his coat that you saw, not what you think or conclude from what you saw?

A. I don't know. I didn't see any reason why he did fall off.

Q. You saw no reason at all why he did fall off?

A. No.

Q. He just grabbed for the train with his right hand, right?

A. He hung with one hand while he was on.

Q. That was his right hand?

A. Yes, sir.

Q. Which foot did he put on first?

A. Left one.

Q. He put the left one on first?

A. Yes, sir.

Q. You saw him put the left one on, then how far had the train gone before he put on his right foot?

A. Probably a quarter of a foot.

Q. Probably a quarter of a foot?

A. A half a foot.

Q. You saw him put the left foot on, then the train went a half a foot and up came the right foot, is that right?

(Testimony of William J. McCauley.)

A. Yes, sir.

Q. Then the train went about twenty feet you said and he fell off?

A. Yes, sir.

Q. Did you see him swing out?

A. Yes, sir.

Q. Before he actually fell?

A. Yes, sir.

Q. Did you see him swing with his body around against the side of the coach?

A. Yes, sir.

Q. You saw that?

A. Yes.

Q. How far had the train gone when you saw him swing out with his body against the side of the coach? [24]

A. Since he got on, about twenty feet.

Q. I understand you to say that it had gone about twenty feet when he fell off?

A. Yes.

Q. How far had it gone when you saw his body swing out against the coach and before he fell off? Would you say about half that distance?

A. No.

The COURT.—Did his body start to swing as soon as his feet hit the step?

A. No, sir.

Mr. WORK.—How far had the train gone before his body started to swing out?

A. Eighteen feet, I would say.

(Testimony of William J. McCauley.)

Q. About eighteen feet?

A. Yes, sir.

Q. He just swung out and down he went, is that right?

A. Yes.

Q. That about describes it?

A. Yes.

Q. Mr. McCauley, would you say that before he fell he turned and faced in your direction?

A. Not in my direction, no, sir.

Q. Not in your direction?

A. He faced in a westerly direction.

Mr. WORK.—Would you say that while his feet were on the steps before he fell off his shoulders swung around until he lost his hold and his feet slipped off and he went under the train; that about it?

A. Yes, sir.

Q. How far had the train gone after he got on it before his shoulders started to swing at all, to the best of your recollection?

A. Approximately eighteen feet.

The next witness called for the plaintiff was

RICHARD H. SANDERSON,

who testified that he lived in Redwood City in October, 1931, and had his place of business at 1355 Broadway, Burlingame. That he went from his residence to his business on the Southern Pacific to the Broadway Station, arriving there at 7:32

(Testimony of Richard H. Sanderson.)

A. M. That he saw an accident on October 29, 1931, at that place. That he was standing on a strip of cement between [25] the Market Street Railway and California Drive; that the strip forms a platform for the Market Street Railway and also the easterly sidewalk of California Drive. That he saw a taxicab stop on Broadway and that the cab was about twenty feet from the Southern Pacific tracks.

Q. Did you observe whether that train was standing or whether it was moving?

A. It was standing. Just started to move as the taxicab stopped.

Q. Tell what you saw the men who alighted from the taxicab do.

A. I saw two men start running for the train and they ran in parallel toward the train, at an angle towards it, and one was slightly ahead of the other and the one behind caught the train, the front end of the coach; the other kept running for a little while, then he stopped.

Q. And the man that was behind—state what he did with relation to getting on the train, if anything?

A. When he got close enough to the train he turned slightly to the right and grabbed the right hand hold, the hand rail they call it, on the front end of the coach and alighted.

Q. Alighted where?

A. On the steps of the train.

(Testimony of Richard H. Sanderson.)

Q. Did you observe his feet?

A. Yes, sir.

Q. Did he have his feet on the train?

A. Yes, sir.

Q. How many of them?

A. Two.

Q. After this man had jumped on the train with both feet and a hand, what did the other man do?

A. The other man ran for a little ways and stopped, apparently was endeavoring to get the rear end of the coach ahead. He stopped and this man that was on the steps of the coach back of it came up where he was and bumped into him. [26]

Q. About how far did the man who put his feet on the train, how far did he ride?

A. I didn't take any measurements—say, probably, probably twenty feet.

Q. Anything happened to the man who jumped on the train?

A. Yes, he stood there for some little time.

Q. Anything happen to him after that?

A. The man who was on the platform—I think it's a part of the platform—that line between the two tracks—bumped into the man that was on the steps and overbalanced him and he swung around to the left and fell down under the train.

Q. Did you know Mr. Aschenbrenner?

A. No, sir.

Q. The man that was on the steps, did you afterwards find out he was injured?

(Testimony of Richard H. Sanderson.)

A. Yes, sir.

Q. The other man was not injured in this accident?

A. No, sir.

Upon cross-examination the witness testified that he was probably 110 or 115 away; that the decedent had run probably forty feet.

Q. Would you say he didn't take ahold of the left hand hold, is that right?

A. No, sir, he took hold of the right.

Q. Took ahold of the right. Would you say that the train went about twenty feet before he fell off, is that right?

A. I should judge that.

Q. Was there a collision between the man who was with him and Mr. Aschenbrenner just at the time he fell off.

A. Yes.

Q. Did Mr. Aschenbrenner's coat brush the man?

A. It was his coat or his body, one of the two.

Q. His coat or his body. Was his body outside the line of the car at the time?

A. Part of it. [27]

Q. Part of his body was outside. When I say "line of the car" I mean the line running from front to rear on the side of the coach?

A. Yes.

Q. How far out of the line of the coach would you say his body was at the time of the collision?

(Testimony of Richard H. Sanderson.)

A. Few inches.

Q. Pardon me.

A. A few inches.

Q. Did he fall immediately?

A. Not immediately, within a few seconds.

Q. What I mean is, when the impact took place between the two men did he fall off immediately?

A. He started to rock and swung around and fell.

The COURT.—This all happened very quickly?

A. Yes, sir.

DAVID McGOWAN

was the next witness called for the plaintiff. He testified that he resided on Balboa Avenue in Burlingame and that he was engaged in business in Burlingame, running a service station on the northwest corner of Broadway and California Drive, and his service station faced the Southern Pacific station. That on the morning of October 29, 1931, he was at his service station and witnessed an accident. That he was standing in the driveway and heard the taxicab toot its horn, and saw the cab turn the corner just as the train was pulling out. The cab was travelling south and he turned east off Broadway from California Drive, making a left hand turn, and stopped. That it stopped fifteen or twenty feet from the Southern Pacific tracks. That there was a train in the station at the time and two

(Testimony of David McGowan.)

gentlemen go out of the cab. When they got out of the cab, one of the men, whom he afterward learned was Aschenbrenner, hesitated as though he was going to pay the driver and then started to run. The other man was ahead of him running. He saw Aschenbrenner jump on the train, grab the bar with his right hand and get on the train. The other man was a short distance ahead of him but he stopped and did not try to [28] board the train. Mr. Aschenbrenner had a coat on his left arm and when he went to go in the car the other man brushed past him. He saw Aschenbrenner's feet slip off the steps and saw him go down under the car. That the train was going ten or twelve miles an hour when Aschenbrenner grabbed it. That there was no obstruction between him and the train to interfere with his vision and he was about 110 feet away. That Mr. Aschenbrenner had hold with his right hand, both feet were on the lower step, and that his overcoat and his left arm were about the only part of his body really on the outside of the vestibule when the other man brushed up against him. That Mr. Aschenbrenner continued on the train ten or twelve feet before he fell off.

On

Cross-examination.

the witness testified that Mr. Aschenbrenner did not fall instantly as the two came together; he swung around first and faced toward the witness with his body swing against the side of the coach.

(Testimony of David McGowan.)

That he never got back to the point from which he started to swing before he fell, but fell almost at once after swinging out. That Mr. Aschenbrenner's companion did not fall but that the impact brushed him away from the train. That the impact was not violent. That the overcoat and the left part of his body were outside the train. That the vestibule door was not closed and that they never close them.

CHARLES BEHR,

the brakeman on the train at the time of the accident, was next called as a witness for the plaintiff. He testified that he was the brakeman on the train involved here, a train running between San Francisco and San Jose. That the train arrived at the Broadway station at 7:32 A. M. That he was on the last car on the right hand steps. That there were two brakeman on the train, the other brakeman up probably six cars ahead of him; the train carrying eight coaches. That he saw [29] the accident occur. That after all the commuters got on he saw a taxicab drive up just as the train was starting up and he saw two men get out of it. They hesitated as though they were paying the driver and then ran at a kind of angle toward the train. One of the gentlemen got on the train while the train was going approximately ten miles an hour and the other man stopped and hesitated like he

(Testimony of Charles Behr.)

was going to get on but changed his mind and didn't get on. That he, the witness, was on the last car looking forward along the coaches. That it would take thirty or forty feet for the train to pick up a speed of five miles an hour. That the vestibule was open; that they had not been closed because the train was not out of the station.

Upon

Cross-examination

he testified that Mr. Aschenbrenner put two feet on the lower step and the train was going between seven and ten miles an hour at the time.

It was stipulated by counsel that Mr. Ishem, the man who was with Mr. Aschenbrenner at the time of the accident, was dead.

The plaintiff rested and thereupon the defendant moved the Court to direct the jury to bring in a verdict in favor of the plaintiff for the single indemnity amount of the policy. The motion was denied and the defendant excepted, and thereupon the defendant called Doris M. O'Keefe as its first witness. She testified that she was at the Burlingame station on the morning of October 29, 1931 and that she saw an accident there where a man made an attempt to board a train. That she was standing on the left side of Broadway, just by the tracks, about ten or fifteen feet away from the

tracks. That she was waiting for the 7:36 A. M. train, a train following the one that Mr. Aschenbrenner tried to board. She saw a taxicab draw up and two gentlemen get out and run for the train. They ran across in front of her, running parallel, the other man being ahead of Mr. [30] Aschenbrenner. She saw the other man stop. Mr. Aschenbrenner jumped and grabbed the rod with his right hand and had an overcoat in his left hand and a bag in his right hand. That he got one foot on the step but she was not positive about the other foot. The train went about half a car length before he fell. That he seemed to swing to the left and slid down and fell underneath.

That the foregoing evidence constitutes all the evidence material to the issues in the case or affecting the matters to which the exceptions relate.

The defendant rested and thereupon moved the court to direct the jury to bring in a verdict for the plaintiff for the sum of $7500.00 and legal interest from the date of the accident to the date of the trial, and that as to the element of double indemnity, that is, the second $7500.00 in issue in the case, that the court direct the jury to find in favor of the defendant upon the ground that the decedent had not become a passenger upon the train at the time that he fell off.

Thereupon the plaintiff moved the court to direct a verdict in its favor upon the ground that the evidence showed that the deceased at the time of his injury was riding as a passenger upon the train.

The court denied the motion of the defendant for a directed verdict and the defendant then and there excepted; and the court denied the motion of the plaintiff for a directed verdict and the plaintiff then and there excepted. The court thereupon instructed the jury in precise words as follows:

"Gentlemen of the Jury: In this action the plaintiff has brought suit to recover from the defendant the sum of fifteen thousand dollars alleged by plaintiff to have become due to her as the widow of one Walter John Aschenbrenner, pursuant to the terms of a certain policy of insurance executed and delivered [31] for good consideration to said Walter John Aschenbrenner by said defendant, United States Fidelity & Guaranty Company.

"In civil cases such as this the affirmative of the issue must be proved and the affirmative here is upon the plaintiff. Upon the plaintiff, therefore, rests the burden of proof. Therefore, before any juror is warranted on his oath to assent to a verdict in favor of the plaintiff he must feel satisfied that the plaintiff's case has been established by a preponderance of evidence. Preponderance of evidence means not the greater number of witnesses, but the greater weight or the more convincing force of the evidence offered by the party having the

affirmative when compared to that opposed to it. If the evidence is so equally balanced in weight and quality that the scales of proof hang even, your verdict should be in favor of the defendant.

"The term 'preponderance of evidence' is not a mere figure of speech. It is a substantial right given by law, that you cannot render a verdict against a defendant unless the plaintiff has established his case by a preponderance of evidence.

"I further instruct you that you are the sole judges of the effect or value of the evidence which has been addressed to you. This power of judging the effect of the evidence, however, is not arbitrary, but must be exercised with legal discretion and in subordination to the rules of evidence. You are not bound to decide in conformity with the declaration of any number of witnesses who do not produce conviction in your mind against a less number or against evidence which satisfies your mind. The mere number of witnesses produced on either side is itself of no importance. You should decide entirely in accordance with the conviction produced in your mind after hearing all the evidence in the case.

"You are likewise the exclusive judges of the credibility [32] of the witnesses. Witnesses are presumed to speak the truth. This presumption, however, may be repelled by the manner in which the witness testifies, by the character of his or her testimony, his or her motives, or by contradictory evidence.

"You are instructed in this case that the defendant, United States Fidelity & Guaranty Company, admits that it executed the Pilot Accident Policy upon which this action is founded, and that there is due and ever since the death of Walter John Aschenbrenner there has been due from it to the plaintiff in this action the sum of $7500.00, the so-called single indemnity amount provided in the policy. The difference between the parties has arisen out of the provisions therein under the heading 'Double Indemnities', and the pertinent provision here with respect to such double indemnity is as follows:

> 'The amounts payable in all the foregoing schedules shall be doubled if such injury is sustained by the insured:
>
> 1. While a passenger in or on a public conveyance (including the platform, steps, or running board thereof) provided by a common carrier for passenger service.'

"It is the position of the plaintiff that the injury sustained by the decedent, Walter John Aschenbrenner, was sustained by him under such circumstances as to bring the facts within this provision; in other words, that at the time of his injury the decedent was a passenger, thus entitling the plaintiff to receive the $15,000 instead of the $7,500 which the defendant concedes. It is the position of the defendant, on the other hand, that the facts here do not bring the injury within the provision of the policy just quoted providing for

double indemnity, and that at the time of his injury the decedent was not a passenger, and this is the only issue in the case. [33]

"The defendant admits the due execution and delivery of the policy of insurance to said Walter John Aschenbrenner, and that the plaintiff, Alice A. Aschenbrenner, is the beneficiary named in said policy to recover thereon in the event of the death of said Walter John Aschenbrenner if caused by and arising under a certain specified condition stated in the policy.

"No dispute arises in this case as to the right of the beneficiary to recover against the defendant pursuant to the terms of the policy, and no question arises as to the validity of the policy as it stands according to its terms.

"It is without dispute that the Southern Pacific Company at the time of the accident was a common carrier and was operating a train which the decedent tried to board, as a passenger train for regular passenger service.

"I further instruct you that the fact that the decedent was attempting to board a moving train did not prevent him from becoming a passenger under the terms of the insurance policy. Whether or not he became a passenger under the terms of the policy is for you to determine.

"You are instructed that if you find from the evidence that the insured, Walter John Aschenbrenner, attempted on the 9th day of November,

1931, to get on board a public conveyance provided by a common carrier for passenger service and that at the time he made such attempt he held a ticket entitling him, by virtue of its issuance to him by such common carrier, to ride as a passenger upon said conveyance, and that at the time he attempted to get on board said conveyance the conveyance was in motion and that he did, while the conveyance was in motion, actually get on board the same by reason of his lifting himself upon the steps and standing thereon with both of his feet upon a step of said conveyance while the same was in motion and holding with one hand to a hand rail attached to said [34] conveyance for the purpose of enabling passengers to lift themselves to the step of said conveyance for the purpose of entering the same, and that the said insured did, while the said conveyance was in motion, actually stand with both feet upon a step of the conveyance and hold to said hand rail with one hand, and that while he was so standing and holding he was thrown from the said step, either by reason of the increased motion of said conveyance or by being struck or jostled by another person attempting to get on board said conveyance, and that by reason of being so thrown he was hurled to the ground and thereupon and thereby suffered injuries from which he shortly died, then I instruct you that he was a passenger upon said conveyance at the time he was hurled therefrom and your verdict must be in favor of the plaintiff in the sum of $15,000.

"You are further instructed that the question of negligence of Walter John Aschenbrenner in getting on board the said conveyance is not at all concerned in this case and that you are not to consider in any respect whether or not the said Walter John Aschenbrenner was negligent in the manner in which he got on board the step of said conveyance, if you find that he did get on board thereof and of said conveyance, as a passenger thereon.

"I instruct you that under the provisions of paragraph 9 of special provisions of the insurance contract in this case it is provided:

> "'Immediate payment of Indemnity 9. All indemnities provided in this policy for loss, other than that of time, on account of disability, will be paid immediately after receipt of due proof.'

And I instruct you that under the above quoted provision of [35] the contract of insurance in this case the plaintiff is entitled to interest from and after the time of delivery of proof of loss, which time is set forth in the complaint herein as the 9th day of November, 1931, and which allegation of the complaint is admitted by the defendant. You will therefore, in the event that you render judgment in favor of the plaintiff in this action, include interest at seven per cent from and after November 9th, 1931.

"Your verdict must be unanimous."

Said charge of the court above set forth comprises all the instructions given to the jury in said cause.

That prior to the close of the evidence the defendant submitted to the court a list of written instructions and requested that the court give said instructions to the jury. Following is an exact copy of the instructions so submitted and requested to be given:

Number 2. Before the plaintiff can recover under the double indemnity provision of the policy here, she must have proven by preponderance of evidence that the decedent, Walter John Aschenbrenner, was a passenger on the train which he tried to board at the time of the accident. It is not enough for the plaintiff to show that the decedent, Walter John Aschenbrenner was on the steps or on the platform; she must go further and show by a preponderance of the evidence that he was on the steps or on the platform as a passenger. If he was not a passenger at the time of his injuries, regardless of where you believe him to have been, the plaintiff is entitled to your verdict only for the amount of the single indemnity provided under the policy, and as to the claim for the double indemnity thereunder the defendant, United States Fidelity & Guaranty Company, is entitled to your verdict.

Number 4. You are instructed that one who attempts to [36] board a moving train, intending to become a passenger thereon, does not become

such passenger until he has actually boarded such train and reached a place of safety thereon. If in the course of boarding a moving train he slips or stumbles or falls and is injured in the course of said slipping or stumbling or falling, he has not become in contemplation of law, a passenger on the train.

Number 5. Before one can become a passenger upon a passenger train there must have been a contract of carriage entered into between him and the railroad company. In other words, he must have offered to become a passenger and the railroad company must have accepted him as such, or the railroad company must have offered to receive him as a passenger and he must have accepted such invitation, and further must actually have become such passenger before such offer on the part of the railroad company is withdrawn. It is not necessary that he should have been asked expressly by the railroad company to become a passenger. The invitation may be implied. There is an implied invitation on the part of the railroad company to all persons who have either bought a ticket, or have the money to pay their fare, and who are not for some other reason not acceptable as a passenger, to become such passenger by boarding its trains at regular stations provided by the company, or other regular stops which the railroad company makes to take on passengers. However, this invitations continues only so long as the train is at rest. As soon as the train commences to move the

invitation is withdrawn and a person who is in the act of boarding a train which has commenced to move before he attempts to board it is, therefore, not a passenger, and does not become a passenger until any peril or hazard accompanying the act of boarding has been passed and the person boarding a moving train has reached a point of safety thereon. If, between the time the boarding is attempted [37] and the time a point of safety is reached thereon, he stumbles, slips or falls, and as a consequence of said stumbling, slipping or falling does not reach a point of safety upon the train then he has not become a passenger by his attempt to board such train.

Number 6. If you find, therefore, in this case that the train which the decedent, Walter John Aschenbrenner, was attempting to board was in motion at the time of attempting to board it, and if you further find that the decedent, Walter John Aschenbrenner, had not gained a point of safety on said train before he fell, then I instruct you that he was not a passenger thereon, and your verdict in this case can be for the plaintiff only in the amount of $7,500 and no more.

Number 7. If you believe that the decedent fell or slipped or stumbled while in the act of boarding the train, and if you further believe that the train at the time he first tried to board it was moving, then I instruct you that he was never a passenger thereon and that your verdict can be for the plaintiff in this case for $7,500 and no more.

Number 8. You are instructed that the act of boarding a train continues until the person boarding it is safely thereon, and if before he is safely thereon he slips or falls or stumbles off the train he has not become a passenger thereon; and if you believe that the decedent, Walter John Aschenbrenner had slipped or stumbled or fallen while he was boarding the train, then he was not a passenger on the train, and your verdict will be for the plaintiff in this action for the sum of $7,500 and no more.

That the said court failed and refused to give to the jury said instructions as requested by defendant or any part of any of them, and to said failure and refusal the defendant, in the presence of the jury and before they retired to deliber- [38] ate upon their verdict, excepted to the ruling of the court refusing to give and read to the jury instructions numbered 2, 4, 5, 6, 7, and 8, requested by the defendant.

The jury thereupon retired to consider their verdict, and thereupon and thereafter and on the 23rd day of November, 1932, the jury rendered a verdict for the plaintiff and against the defendant in the sum of $15,000.00, of which the following is a copy:

> "We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of Fifteen thousand Dollars and interest at 7% from and after Nov. 9, 1931.
>
> $15,000.00
>
> FRANK A. BOGART, Foreman."

And thereafter and on said day judgment was duly rendered by said court upon said verdict in favor of the plaintiff and against the defendant in the amount of Fifteen thousand dollars, together with interest thereon from and after November 9, 1931.

For as much as the matters above set forth do not fully appear of record the defendant tenders this its Bill of Exceptions and prays that the same may be signed and approved by the judge of this court.

Dated, February 14th, 1933.

HORACE W. B. SMITH,
GEO. A. WORK,
Attorneys for Defendant
and Appellant.

The foregoing bill of exceptions was filed on the 14th day of February, 1933, within the time allowed for filing the bill of exceptions, as said time was duly extended by stipulation of the parties extending time to February 16, 1933, said stipulations having been made and filed in the November term of said court, and the said bill of exceptions having been filed before the expiration of the term thereof. Said bill [39] contains all the evidence given and proceedings had upon the trial of this action, and is in all respects correct, and is hereby approved allowed and settled and made a part of the record herein.

Dated, February 14th, 1933.

A. F. ST. SURE,
United States District Judge for the Northern District of California, Southern Division.

Service of a copy of the above bill of exceptions is hereby acknowledged this 14th day of February, 1933.

WRIGHT, WRIGHT & LARSON,
Attorneys for Plaintiff and Appellee.

[Endorsed]: Filed Feb. 14, 1933. Walter B. Maling, Clerk. [40]

(Title of Court and Cause.)

PETITION FOR APPEAL.

To the Honorable A. F. St. Sure, Judge of the United States District Court.

United States Fidelity & Guaranty Company, a corporation, your petitioner, who is the defendant in the above entitled cause, prays that it may be permitted to take an appeal from the judgment entered in the above cause on the 23rd day of November, 1932, to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors which is filed herewith, and your petitioner desires that said appeal shall operate as a supersedeas and, therefore, prays that an order be made fixing the amount of security

which said defendant shall give and furnish upon such appeal, and that upon giving such security all further proceedings in this court be suspended and stayed until the determination of said appeal by the said United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated January 20, 1933.

HORACE W. B. SMITH,
GEO. A. WORK,
Attorneys for Defendant.

Due receipt of a copy of the within petition for appeal is hereby admitted this 20th day of January, 1933.

WRIGHT & WRIGHT & LARSON,
Attorneys for Plaintiff.

(Endorsed): Filed Jan. 21, 1933. [41]

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

Comes now the United States Fidelity & Guaranty Company, a corporation, defendant and appellant in the above entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause, from the judgment of this court entered on the 23rd day of November, 1932:

1. The trial court erred in denying defendant and appellant's motion for a directed verdict and in

refusing to direct the jury to render its verdict in favor of the defendant as to the double indemnity claim of the plaintiff under the policy of insurance involved in this action.

2. That the verdict of the jury is not sustained by the evidence.

3. That the court erred in refusing to give to the jury instructions requested by the defendant and appellant, numbered 2, 4, 5, 6, 7 and 8, which said instructions were duly requested of the court to be given to the jury and which request was refused, and which refusal was duly excepted to by the defendant in the presence of and before the retirement of the jury to deliberate upon its verdict. The said instructions are as follows:

"Number 2. Before the plaintiff can recover under the double indemnity provision of the policy here, she must have proven by preponderance of evidence that the decedent, Walter John Aschenbrenner, was a passenger on the train which he tried to board at the time of the accident. It is not enough for the plaintiff to show that the decedent, Walter John Aschenbrenner, was on the steps or on the platform; she must go further and show by a preponderance of the evidence [42] that he was on the steps or on the platform as a passenger. If he was not a passenger at the time of his injuries, regardless of where you believe him to have been, the plaintiff is entitled to your verdict only for the amount of the single indemnity provided under the

policy, and as to the claim for the double indemnity thereunder the defendant, United States Fidelity & Guaranty Company, is entitled to your verdict.

"Number 4. You are instructed that one who attempts to board a moving train, intending to become a passenger thereon, does not become such passenger until he has actually boarded such train and reached a place of safety thereon. If in the course of boarding a moving train he slips or stumbles or falls and is injured in the course of said slipping or stumbling or falling, he has not become in contemplation of law, a passenger on the train.

"Number 5. Before one can become a passenger upon a passenger train there must have been a contract of carriage entered into between him and the railroad company. In other words, he must have offered to become a passenger and the railroad company must have offered to receive him as a passenger and he must have accepted such invitation, and further must actually have become such passenger before such offer on the part of the railroad company is withdrawn. It is not necessary that he should have been asked expressly by the railroad company to become a passenger. The invitation may be implied. There is an implied invitation on the part of the railroad company to all persons who have either bought a ticket, or have the money to pay their fare, and who are not for some other reason not acceptable as a passenger, to become such passenger by boarding its trains at regular

stations provided by the company, or other regular stops which the railroad company makes to take on passengers. However, this invitation continues only so long as the train is at rest. As soon as the train commences to move the invitation is withdrawn [43] and a person who is in the act of boarding a train which has commenced to move before he attempts to board it is, therefore, not a passenger, and does not become a passenger until any peril or hazard accompanying the act of boarding has been passed and the person boarding a moving train has reached a point of safety thereon. If, between the time the boarding is attempted and the time a point of safety is reached thereon, he stumbles, slips or falls, and as a consequence of said stumbling, slipping or falling does not reach a point of safety upon the train, then he has not become a passenger by his attempt to board such train.

"Number 6. If you find, therefore, in this case that the train which the decedent, Walter John Aschenbrenner, was attempting to board was in motion at the time of attempting to board it, and if you further find that the decedent, Walter John Aschenbrenner, had not gained a point of safety on said train before he fell, then I instruct you that he was not a passenger thereon, and your verdict in this case can be for the plaintiff only in the amount of $7500 and no more.

"Number 7. If you believe that the decedent fell or slipped or stumbled while in the act of boarding the train, and if you further believe that the train

at the time he first tried to board it was moving, then I instruct you that he was never a passenger thereon and that your verdict can be for the plaintiff in this case of $7500 and no more.

"Number 8. You are instructed that the act of boarding a train continues until the person boarding it is safely thereon, and if before he is safely thereon he slips or falls or stumbles off the train he has not become a passenger thereon; and if you believe that the decedent, Walter John Aschenbrenner, had slipped, or stumbled, or fallen while he was boarding the train then he was not a passenger on the train, and your verdict will be for the plaintiff in this [44] action for the sum of $7500 and no more."

WHEREFORE, defendant prays that the said judgment may be reversed and for such other and further relief as to the court may seem just and proper.

HORACE W. SMITH,
GEO. A. WORK,
Attorneys for Defendant
and Appellant.

Due receipt of a copy of the within Assignment of Errors is hereby admitted this 20th day of January, 1933.

WRIGHT & WRIGHT & LARSON,
Attorney for Plaintiff.

(Endorsed): Filed Jan. 21, 1933. [45]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL WITH SUPERSEDEAS.

The petition of United States Fidelity & Guaranty Company, a corporation, defendant in the above entitled cause, for an appeal from the final judgment is hereby granted and the appeal is allowed, and upon petitioner filing a bond in the sum of $22,500.00 with sufficient sureties, and conditioned as required by law, the same shall operate as a supersedeas of the judgment made and entered in the above cause, and shall suspend and stay all further proceedings in this court until the termination of said appeal by the Circuit Court of Appeals in and for the Ninth Circuit.

Dated, January 21, 1933.

FRANK H. KERRIGAN,
District Judge.

[Endorsed]: Filed Jan. 21, 1933. [46]

[Title of Court and Cause.]

FIDELITY AND DEPOSIT COMPANY OF MARYLAND—BALTIMORE.

KNOW ALL MEN BY THESE PRESENTS:

That Fidelity and Deposit Company of Maryland, a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, and duly licensed to transact business in

the State of California, is held and firmly bound unto Alice Aschenbrenner, plaintiff in the above entitled case, in the sum of Twenty-two Thousand Five Hundred and no/100 ($22,500.00) Dollars, to be paid unto Alice Aschenbrenner for which payment, well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, firmly by these presents.

SIGNED, sealed and dated this 23rd day of January, A. D. 1933.

THE CONDITION OF THIS OBLIGATION IS SUCH, that

WHEREAS, the United States Fidelity and Guaranty Company, a Corporation, defendant herein has taken or is about to take an appeal to the United States Circuit Court of Appeals, Ninth Circuit, from a judgment made, entered and rendered against it on November 23, 1932 for the sum of Fifteen Thousand and no/100 ($15,000.00) Dollars, besides interest. [47]

NOW, THEREFORE, the condition of the above obligation is such that if the said United States Fidelity and Guaranty Company shall prosecute its said appeal to effect and answer all costs which may be adjudged if it fails to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

And it is further hereby expressly agreed that in case of a breach of any condition of the above obligation and this bond, the said Southern Division

of the United States District Court for the Northern District of California, may upon notice to the Fidelity and Deposit Company of Maryland, of not less than ten (10) days, proceed summarily in the above entitled case therein pending to ascertain the amount which said Fidelity and Deposit Company of Maryland is bound to pay on account of such breach, and render judgment therefor against it, and award execution therefor.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

[Corporate Seal] By Guertin Carroll,
Attorney in Fact.

Attest:
C. A. Bevans,
Agent.

The premium charged for this bond is $300.00 Dollars per annum.

Approved: A. F. St. Sure, District Judge, Jan. 23, 1933.

State of California,
City and County of San Francisco.—ss.

On this 23rd day of January, A. D. 1933, before me, Emily K. McCorry, a Notary Public in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared Guertin Carroll, Attorney-in-Fact, and C. A. Bevans, Agent, of the Fidelity and Deposit Company of Maryland, a corporation, known to me to be the persons who executed the within instrument on

behalf of the corporation therein named and acknowledged to me that such corporation executed the same, and also known to me to be the persons whose names are subscribed to the within instrument as the Attorney-in-Fact and Agent respectively of said corporation, and they, and each of them, acknowledged to me that they subscribed the name of said Fidelity and Deposit Company of Maryland thereto as principal and their own names as Attorney-in-Fact and Agent respectively.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year first above written.

[Notarial Seal] EMILY K. McCORRY,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jan. 23, 1933. [48]

[Title of Court and Cause.]

PRAECIPE ON APPEAL.

To the Clerk of the above entitled Court:

You are requested to take a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following and no other papers or exhibits, to-wit:

Judgment roll.

Petition for appeal.

Order allowing appeal with supersedeas.

Citation on appeal.

Assignment of errors.

Bond for supersedeas on appeal.

Bill of exceptions.

This praecipe on appeal and admission of service thereof.

Dated, March 2nd, 1933.

HORACE W. B. SMITH,
GEO. A. WORK,
Attorneys for Defendant and Appellant.

[Endorsed]: Filed Mar. 3, 1933. [49]

[Title of Court and Cause.]

AFFIDAVIT OF SERVICE.

State of California,
City and County of San Francisco.—ss.

Berniece Melbostad, being first duly sworn, deposes and says:

That she is a citizen of the United States, over the age of eighteen years, and not a party to the within entitled action; that she personally served a copy of the praecipe on appeal in the within action upon the attorneys for the plaintiff, Wright

& Wright & Larson, by leaving said copy of said praecipe on appeal with the secretary of said Wright & Wright & Larson at their offices in the Mills Building, San Francisco, California, on the 3rd day of March, 1933, between the hours of 9:30 and 5:00 P. M. of said day.

BERNIECE MELBOSTAD.

Subscribed and sworn to before me, this 3rd day of March, 1933.

[Seal] MARIE FORMAN.

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Mar. 4, 1933. [50]

[Title of Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 50 pages, numbered from 1 to 50, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Alice Aschenbrenner v. United States Fidelity and Guaranty Company, a corporation, No. 19,198-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on

appeal is the sum of $20.55 and that the said amount has been paid to me by the attorneys for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 6th day of March A. D. 1933.

[Seal] WALTER B. MALING,
B. E. O'HARA,
Deputy Clerk. [51]

[Title of Court and Cause.]

CITATION.

To the above named plaintiff, and to her attorneys of record, Wright & Wright & Larson and John Ralph Wilson, Esqs.:

YOU ARE HEREBY CITED and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, State of California, thirty (30) days from and after the date this citation bears date, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Southern Division of the Northern District of California, wherein United States Fidelity & Guaranty Company, the defendant, is appellant, and Alice Aschenbrenner, the plaintiff, is appellee; to show cause, if any there be, why the judgment rendered against the said defendant and appellant, as in said appeal mentioned, should not

be corrected and why speedy justice should not be done the parties in that behalf.

WITNESS: The Honorable A. F. St. Sure, Judge of the District Court of the United States for the Northern District of California, this 15th day of February, 1933.

[Seal] A. F. ST. SURE,
Judge of the District Court of the United States for the Northern District of California.

Receipt of a copy of the above citation is hereby acknowledged this 16th day of February, 1933.

JOHN RALPH WILSON,
WRIGHT & WRIGHT & LARSON,
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1933. [52]

[Endorsed]: No. 7110. United States Circuit Court of Appeals for the Ninth Circuit. United States Fidelity & Guaranty Company, a Corporation, Appellant, v. Alice Aschenbrenner, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed March 15, 1933.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7110

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation,

Appellant,

vs.

ALICE ASCHENBRENNER,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated Term, to wit, the October Term, A. D. 1933 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Tuesday the thirteenth day of June in the year of our Lord One Thousand Nine Hundred and Thirty-three.—

Present: The Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANCIS A. GARRECHT, Circuit Judge.

No. 7110

UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation,

Appellant,

vs.

ALICE ASCHENBRENNER,

Appellee.

ORDER OF SUBMISSION.

ORDERED above cause argued by Mr. George A. Work, Counsel for the appellant, and by Mr. Allen G. Wright, counsel for the appellee and submitted to the court for consideration and decision, with leave to counsel for appellant to file a reply brief in three days.

At a stated Term, to wit, the October Term, A. D. 1933 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the Twenty Sixth day of June in the year of our Lord One Thousand Nine Hundred and Thirty Three.

Present: The Honorable WILLIAM H. SAWTELLE, Circuit Judge, Presiding, Honorable FRANCIS A. GARRECHT, Circuit Judge.

No. 7110

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the court, ORDERED that the typewritten opinion this day rendered by this court in the above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Before: WILBUR, SAWTELLE and GARRECHT, Circuit Judges.

SAWTELLE, Circuit Judge:

Except in minor respects, the facts in this case are undisputed. In the following summary, we are adopting the interpretation of the facts most favorable to the appellee.

The appellant, issued a policy of insurance under which Walter Aschenbrenner, hereinafter referred to as the decedent, was the assured, and the appellee, who was the plaintiff below, was the beneficiary. The policy provides for a payment of $7,500 as the principal sum against loss of life resulting directly and independently of all other causes from accidental bodily injuries.

The policy further provides for double indemnity payable as follows:

> "Schedule V. Double Indemnities.
>
> "The amounts payable in all the foregoing schedules shall be doubled if 'such injury' is sustained by the insured,
>
> "(1) While a passenger in or on a public conveyance (including the platform, steps, or running board thereof) provided by a common carrier for passenger service."

The only issue in this case is whether the double indemnity or only the single indemnity is payable under the facts. The appellant conceded at the trial that it was liable for the single indemnity, the accidental death being established. The only question in the case is whether at the time of the decedent's fatal injuries, he was a "passenger" on or in a common carrier, within the terms of the policy.

About 7:35 in the morning of October 29, 1931, the decedent and a friend, a Mr. Ishem, arrived at the Southern Pacific Broadway Station in Burlingame, California, in a taxicab. The cab drew up at a distance of between 25 to 40 feet from a train, which was just commencing to pull out of the station. The decedent paused a moment, fumbling for money with which to pay the taxicab driver, who told him to go on and pay him that night. Whereupon, the decedent and his companion commenced running for the train across the station platform.

The train was headed north, bound for San Francisco. The two men ran somewhat on a diagonal toward the track. Ishem was on the left and a little ahead. He did not attempt to board the train, but stopped as he came to it.

When the two men reached the train, it was moving at a rate of speed estimated at from seven to ten miles an hour.

The decedent was running for the front platform of the second to the last car on the train, and Ishem was running for the rear platform of the third car from the rear of the train. The vestibule doors were open, because, according to a brakeman who testified,

"the train was not out of the station". Another witness testified that the vestibule doors were never closed.

The decedent jumped upon the lower step, his right hand grasping the handrail, and while standing there he was carried to where Ishem stood.

The cause of the accident, as indicated by the testimony of three of the witnesses, was that as the train moved forward, carrying the decedent to the point where Ishem stood, the decedent's overcoat or the small part of the decedent's body outside of the vestibule, brushed against Ishem and caused the decedent to loose his hold and fall. From the time he jumped on the train until he was carried to the point where Ishem stood, the decedent was standing with both feet on the lower step of the car and inside the vestibule, except for a small part of his body, which was outside. The decedent was carrying his overcoat over his left arm and a brief case in his right hand. After he was on the step he "apparently started to change hands with his overcoat or brief case".

The train proceeded about twenty feet when the decedent fell. The cause of his fall is not clear. While, as we have seen, three witnesses said that the decedent brushed against Ishem, the remaining witnesses did not know what caused him to fall.

The decedent swung out from the train, holding only with his right hand, was thrown against the side of the car, and fell between the platform and the track, and was crushed, dying at a hospital a few hours later.

Both sides made timely motions for a directed verdict in their respective favor. All such motions were denied, exceptions were duly taken, and the case was submitted to the jury. The verdict was for a double indemnity, or $15,000. From a judgment rendered on that verdict, the defendant company appeals.

While there are three assignments of error, our decision upon the first is determinative of the case. That assignment is to the effect that the trial court erred in denying the appellant's motion for a directed verdict as to the appellee's claim for double indemnity. The correctness of that assignment, in turn, depends upon whether or not the decedent was a "passenger" on the train at the time of his death; or if, as a matter of law from the facts in the case, interpreted so as to give the appellee the benefit of every substantial conflict, the decedent was not a passenger at the time he fell, then clearly the trial court should have directed a verdict for the appellant on the double indemnity feature of the case.

The adjudicated cases dealing with the precise point involved are not numerous, particularly those decided by Federal courts. Furthermore, there is some conflict in the authorities. For these reasons, we will quote frequently and fully from the leading cases in point, instead of following our usual practice of quoting only a few authorities and citing the rest.

It may be conceded at the outset that a policy is to be construed strictly against the insurance company and liberally in favor of the insured. Never-

theless, the Supreme Court of the United States has definitely fixed the boundaries of this liberality in favor of the insured. In Ripley v. Insurance Co., 83 U. S. 336, 338, Mr. Chief Justice Chase, in dealing with an accident insurance policy, said:

> "The contract must receive the construction which the language used fairly warrants. What was the understanding of the parties, or, rather, what understanding must naturally have been derived from the language used?"

Applicable here, also, is the language of the St. Louis Court of Appeals in Mitchell v. German Commercial Accident Co., 161 S. W. 362, 363-364:

> "Though it be that the language of insurance contracts is to be construed most favorably to the insured and against the insurer with a view to effectuating the insurance, and that all doubtful language is to be resolved in favor of the insured, the courts are not authorized to seize upon certain and definite covenants expressed in plain English with violent hands, and distort them so as to include a risk clearly excluded by the insurance contract."

The appellee contends that, in a case of this kind, the court should construe the word "passenger" in its "plain, ordinary, and popular sense". During the oral argument before this court, counsel for the appellee suggested the dictionary definition of "passenger", such as "a person who travels in a public conveyance", as applicable here. But such a definition would include members of a train crew, who, even in

the "popular" sense, are not considered "passengers".

It must be remembered, after all, that the policy in question is a legal document, solemnly executed, and that such document is being construed in a court of law. We can see no reason why the parties to this contract did not intend that the terms used should have their usual *legal* signification. Indeed, both reason and authority point to the opposite conclusion.

The term "passenger" is used primarily in contracts, whether express or implied, between carriers and those who are transported by them. It would seem, therefore, that, for the proper definition of the term "passenger", we should turn to the law of carriers.

This suggestion, however, has been vigorously resisted by counsel for the appellee, both in the brief and in the oral argument. Counsel makes the somewhat unusual contention that "passenger" means one thing in the law of carriers, and quite another in the law of insurance.

We cannot subscribe to this view, for we believe that it finds support neither in logic nor in authority. Both legal reasoning and legal language would become hopelessly obscure and confused if definitions, instead of being in truth "definite", could thus be shifted about.

We believe that the rule is properly expounded in Cooley's Briefs on Insurance, 2d ed., vol. 6, page 5590:

> "Policies usually provide for the payment of double indemnity if the injury causing disability

or death is received under certain specified conditions. One of the most common provisions is one that provides for double indemnity if the injury is received while riding as a passenger in any conveyance intended for the transportation of passengers. *In determining who is a passenger within such a clause, the same rules are applied as would govern if the action was* [were] *against the carrier.*" (Italics indicate bold-faced type in the text.)

This rule was recognized in the case of Travelers' Ins. Co. v. Austin, 42 S. E. 522, 524, in which the Court of Georgia said:

> "With this in view, the true test to be applied to determine whether one injured in a railroad accident can recover from an insurance company double indemnity is to inquire whether, presuming that a right of action exists against the railroad company, the plaintiff would be entitled to sue that company in the capacity of a passenger or an employe."

In that case, the court held that the decedent was solely an employee and not a passenger of the company.

In Berliner v. Travelers' Ins. Co., 121 Cal. 451, 465, the court said:

> "These were cases that involved the liability of the railroad company for injury to its passengers while rightfully upon the engine, and were not cases of accident insurance; but the

word 'passenger' as here used is evidently i
tended to designate the character or relati
the insured sustained to the proprietor of t
conveyance, and are therefore in point."

In Quinn v. New York Life Ins. Co., 195 N. W
427, 428, the Supreme Court of Michigan said:

"It is further contended that, as betwe
plaintiff and the defendant, a different ru
should be applied than between plaintiff and t
street car company on the question whether t
insured was a passenger at the moment he wa
struck.

"Considering the last question, we are unabl
to see why any distinction should be made be
tween the insurance company as a defendan
and the street car company. At the time th
provision, 'while traveling as a passenger on
street car', etc., was adopted by defendant an
made part of its contract, that phrase had wel
understood meaning in the law, and it is reason
able to suppose that the meaning given to it b
the courts was well understood and considere
by defendant before making it a part of it
double liability, and it was well known by bot
parties when the contract was made that, shoul
the parties afterwards disagree upon the ques
tion of liability, the courts would probably giv
the language the same construction they ha
given it in cases where transportation com
panies were defendants. We cannot agree wit
defendant in this suggestion."

It is true that the decisions in both the Berliner and the Quinn case, supra, were adverse to the insurance company. In the Berliner case, the policy excluded recovery for an accident while the insured was "in or on any such conveyance not provided for transportation of passengers". The court held that the decedent, though riding on the locomotive, at the invitation of an official of the railroad, at the time of the accident, was, within the terms of the policy, a passenger, since "the locomotive is part of the 'conveyance' provided for the transportation of passengers upon a railroad". In the Quinn case, the decedent was struck down by a taxicab while he was stepping off, or after he had stepped off, a street car that was slowing down to a stop. The court there held that, since there was testimony to "justify an inference by the jury that Quinn was struck while in the act of alighting, and before he had safely alighted onto the pavement", he was a passenger, and that therefore his widow could recover under the policy. The policy in that case covered death "while traveling as a passenger on a street car", etc.

The facts of both the Berliner and the Quinn cases are easily distinguishable from those at bar. Hence the judgments there rendered against the insurance companies do not detract from the authority of those two cases for the general proposition which they lay down; namely, that, for the definition of the term "passenger", the courts must have recourse to the law of carriers.

To that law we now turn.

In the language of Judge Sanborn in the case of Purple v. Union Pac. R. Co. (C. C. A.), 114 F. 123, 126:

> "A contract is indispensable to the relation of carrier and passenger. The minds of the parties must meet upon the agreement that the carrier will transport and the passenger will pay for transportation, 'in the absence of a specific agreement or permission by the proper officer of the transportation company that the latter will carry the passenger without compensation. This contract of carriage may, it is true, be express or implied, but if it does not exist in either form the relation of carrier and passenger cannot have been created. An implied agreement to pay fare, and hence the relation of carrier and passenger, undoubtedly arises where one enters a passenger car and rides towards his destination."

See also, Fels v. St. Louis & S. Ry. Co. (C. C. A. 8), 275 F. 881-3; Pere Marquette R. Co. v. Strange (S. Ct., Ind.), 84 N. E. 819, 821.

Like all other contracts, the contract of carriage arises through an offer or invitation, express or implied, and an acceptance, express or implied. When a train is stationary at some place where it is the custom of the railroad to take on passengers, there is an implied invitation to the general public to avail itself of the company's transportation facilities by boarding the train.

But, when the train commences to move, that invitation is withdrawn, for it may no longer with physical safety be accepted.

In Tompkins v. Portland Ry. etc. Co., 77 Ore. 174-?, 150 Pac. 758, the late Justice Bean, a jurist held in high esteem in this circuit, thus formulated the rule:

> "There is little controversy on the question that the stopping of a street-car at the place where passengers are usually received constitutes an invitation to the public to board and become passengers. This invitation continues while the car is standing. The starting of the car is a withdrawal of the invitation."

In Palmer v. Willamette Valley Southern Ry. Co., 171 Pac. 1169, 1172, the Supreme Court of Oregon again recognized the above principle, in the following language:

> "While waiting at the depot a standing train serves as an invitation to all intending passengers to board it, and the invitation carries with it an assurance that the passengers may board the train in safety. [Case cited.] But starting the train ordinarily operates as a withdrawal of the invitation. [Authorities cited.]"

Both the rule and the reason therefor are well stated in White's Personal Injuries on Railroads, Vol. II, at §§556 and 783, pages 838 and 1176:

> "Nor does a person become a passenger, who gets on a train after it has started to move, until

he actually reaches a place of safety inside the car and no action can be maintained by his representatives, if he falls off the platform and is killed, in attempting to get on such train.

* * * * * * *

"Boarding or attempting to board a moving train is an improper and dangerous act *and in legal contemplation, the invitation of the railroad company is withdrawn the very instant the train begins to move.* If there is no evidence, therefore, of any invitation on the part of the train-employees, for the passenger to board the moving train, or nothing to show that they knew of the passenger's attempt and ratified it, there can generally be no recovery for an injury received in such an attempt." (Italics our own.)

The rule has been recognized in the Third Circuit in the case of Trapnell v. Hines (C. C. A.), 268 F. 504, 506, in which Judge Woolley used the following language:

"The plaintiff did not avail himself of these instrumentalities of safety but boarded the train on the wrong side after the train had started; that is, on a side at which the carrier had made no preparation to receive passengers and *at a time when the carrier had, by starting the train, withdrawn his invitation to passengers.*" (Italics our own.)

In Illinois Cent. R. Co. v. Cotter, 103 S. W. 279, 280, the Court of Appeals of Kentucky said:

"One who attempts to jump upon a rapidly moving train does not become a passenger upon the train, although he may have a ticket for it. Dodge v. R. R. Co., 148 Mass. 209, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541; Baltimore Traction Co. v. State, 78 Md. 409, 28 Atl. 397; Hutchinson on Carriers, §249; 3 Thompson on Negligence, §2636."

A similar statement by the same court is to be found in Kentucky Highlands R. Co. v. Creal, 179 S. W. 417, 418, which cites the Cotter case, supra, and is published, with annotations, in L. R. A. 1916B, at pages 830-835.

Again, in Mathews v. Metropolitan St. Ry. Co., 137 S. W. 1003, 1005, the Kansas City Court of Appeals said:

"It is clear that the attempt of Mathews to board the car after it had left the usual stopping place, and was starting up the incline, did not create the relationship of passenger and carrier."

The Supreme Court of Missouri adopted this doctrine in the case of Schepers v. Union Depot R. Co., 29 S. W. 712, 714, where it said:

"It follows from what has been said that plaintiff did not become a passenger by a mere attempt on his part to board the car while in motion, as is declared by this instruction. There must have been some act on the part of the car-

rier indicating an acceptance. Stager v. Ry. Co., 119 Pa. St. 70, 12 Atl. 821."

See also, Lee v. Baker (Court of Civil Appeals, Texas), 251 S. W. 580; Schaefer v. St. Louis & S. Ry. Co. (S. Ct., Mo.), 30 S. W. 331-2; 4 R. C. L. §§489, 490, 493, pp. 1029-1033, 1036-1039.

But, as we have seen, although the intending passenger fails to become a passenger in fact and in law, by merely attempting to board a moving train, he does become a passenger when he reaches a place of safety. In the instant case, however, the event itself shows that decedent never reached a place of safety; else he would not have been killed! His position upon the lower step of the car was of so brief a duration, and his lack of equilibrium during that instant of time was so evident, that it would be paradoxical to say that the decedent had reached a place of safety at the time he fell off the car. His attempt to board that train and his fall therefrom were in reality parts of the same operation—an operation by which the decedent attempted, but unsuccessfully attempted, to attain the status of passenger.

It is true that the policy provides for double indemnity for injuries sustained while the insured is on the platform, steps or running board of a public conveyance. But the very same clause also provides that the insured is to be a *passenger* on such conveyance. Therefore, if the decedent had failed to reach the status of *passenger* when he fell off the

train, his beneficiary is not entitled to recover the double indemnity.

Emphasis upon the "place of safety" rule was given by the Supreme Court of Massachusetts in the case of Merrill v. Eastern R. Co., 1 N. E. 548, 550, where the decedent first had been traveling on the engine, but got off at a station and, after the train had started, got on the front platform of the front passenger car. He stood on the step of the platform, facing inward, and, *after the train had gone from a quarter to half a mile*, fell off and was killed. Of such a situation, the Supreme Court of Massachusetts said:

> "Then, supposing that his start upon the engine did not give a character to his subsequent relation to the defendant, and that the deceased was in the same position as if he had attempted to get on at East Salisbury for the first time, it is clear that when he attempted to get upon the moving train after it had started, he was outside of any implied invitation on the defendant's part, and did not at once acquire the rights of a passenger in the hands of a carrier. We may admit that if he had reached a place of safety, and seated himself inside the car, the bailment of his person to the defendant would have been accomplished, and that he would not have been prevented from asserting such rights because of the improper way of getting upon the train. But we think that he could not assert them until he had passed the danger which met him at the threshold, and had put himself

> in the proper place for the carriage of passengers."

See also, Horwitz v. Jefferson County Traction Co. (Court of Civil Appeals, Texas), 188 S. W. 26, 28.

The appellee insists that cases involving the liability of a carrier to its passengers should not be regarded as authority in the present litigation, which involves an insurance company. But the reason for the doctrine upon which we are here relying is the same, whether the case involves a carrier or an insurance company; namely, a person acquiring the full status of a passenger is known to occupy an extremely safe situation, while one who is attempting to board a moving train is in a precarious state.

The appellant suggests this reason in its brief, and the appellee has attempted to answer the point by a resort to satire and a quotation from Mark Twain. Nevertheless, this reason for the rule finds its sanction in the law.

Discussing the double indemnity clause in a connection not applicable here, Fuller, in his "Accident and Employers' Liability Insurance", Chapter 4, page 334, goes on to use language that does recognize the reason for the rule to which we are here adhering:

> "The theory of this clause is that the interior of a passenger car is a place of exceptional safety, and in view of the slight risk to one

> seated there, the insurance company can contract to pay a double indemnity in the event of injury or death."

It is true that the learned author was not there discussing a policy containing the terms that form part of the policy in the instant case; but his observations regarding the *reason* for the rule—namely, that a passenger is in an exceptionally safe situation—are in point here. The applicability of the rule itself to the instant case has been established, we believe, by the authorities already cited, which indicate *when* the status of passenger is acquired. Even under the present policy, as we have seen, the insured cannot recover unless he has in fact and in law acquired the status of passenger.

In Fuller's treatise, there is quoted as an annotation to this same Chapter 4, at pages 333-334, the case of Wallace v. Employers' Liability Assur. Corp., 26 Ont. L. Rep. 10, in which the court said:

> "It is common knowledge that the vast majority of street car accidents occur in connection with entering or leaving the car; injuries to those in or on the cars being limited to the rarer cases of collisions, or the car running off the track."

In Anable v. Fidelity & Casualty Co., 63 A. 92, 93, the Supreme Court of New Jersey said:

> "Nor is there any reason discoverable why the contract should not be construed in accordance with its plain language. The risk for which

> the defendant contracted to pay double insurance, was without doubt regarded as distinctly less hazardous than the single insurance risk. A passenger in a public conveyance who keeps himself within a car, or on a steamboat, is regarded as subjected to the slightest risk; while the act of getting on or off moving trains, involves a considerable degree of peril."

The Court of Errors and Appeals of New Jersey affirmed the foregoing case for the reasons stated in the opinion of the Supreme Court. 65 A. 1147.

The appellee insists that full force should be given to the words "platform, steps, or running board". In this contention, the appellee is quite correct. But equal force should be given to the words "while a passenger". If the appellee has not brought herself within *all* the conditions precedent to recovery under the policy, she cannot be awarded double indemnity.

For the foregoing reasons, we do not believe that the decedent was a "passenger" at the time he was killed, and that therefore the appellee is not entitled to double indemnity under the policy. The court below should have directed a verdict to that effect.

Accordingly, the judgment is reversed, and the case remanded with instructions to the District Court to enter a judgment for the appellee in the principal sum of $7,500 instead of $15,000. Interest at seven per cent. on said sum of $7,500 is to be allowed to the appellee from November 9, 1931.

Judgment reversed and remanded, with instructions.

[Endorsed]: Opinion. Filed June 26, 1933. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 7110

UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation,

Appellant,

vs.

ALICE ASCHENBRENNER,

Appellee.

JUDGMENT.

UPON APPEAL from the District Court of the United States for the Northern District of California, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and was duly submitted:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of the appellant and against the appellee, and that

this cause be, and hereby is remanded to the sa
District Court with instructions to enter a jud
ment for appellee in the principal sum of $7,50
instead of $15,000. Interest at seven per cent. o
said sum of $7,500, is to be allowed to the appell
from November 9, 1931.

IT IS FURTHER ORDERED AND AD
JUDGED by this Court that the appellant recov
against the appellee for its costs herein expende
and have execution therefor.

[Endorsed]: Filed and entered June 26, 193
Paul P. O'Brien, Clerk.

At a stated Term, to wit, the October Term, A. D. 1933 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Wednesday the Sixth day of September in the year of our Lord One Thousand Nine Hundred and Thirty-Three.

Present: The Honorable CURTIS D. WILBUR, Senior Circuit Judge, presiding. Honorable WILLIAM H. SAWTELLE, Circuit Judge.

No. 7110

[Title of Cause.]

ORDER DENYING PETITION FOR REHEARING.

Upon consideration thereof, and by direction of the court, ORDERED petition of appellee, filed July 26, 1933, for a rehearing of above cause be, and hereby is denied.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Messrs. Wright, Wright & Larson, counsel for the appellee, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court

in the above cause be, and hereby is stayed to and including October 11, 1933; and in the event the petition for a writ of certiorari to be made by the appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR
United States Circuit Judge.

Dated: San Francisco, California,
September 7, 1933.

[Endorsed]: Filed Sep 7 1933. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

APPLICATION TO STAY ISSUANCE OF MANDATE.

To the Circuit Court of Appeals for the Ninth Circuit:

Decision in the above entitled cause, denying the petition for a rehearing, was entered by this Court under date of September 6, 1933. Within the time allowed by law therefor and within thirty days from October 11, 1933, counsel for appellee proposes to petition the Supreme Court of the United States to grant a writ of certiorari to review the decision of this Court. An additional stay of the issuance of the mandate of this Court is requested to enable counsel to prepare the necessary petition and brief and to perfect arrangement for the Association of Washington counsel in the case. A stipulation by counsel for appellant consenting to such additional stay is filed herewith.

It is further requested that upon filing of the petition for certiorari issuance of its mandate by this Court be further stayed until disposition by the United States Supreme Court of the proceedings on certiorari.

Respectfully submitted,
RANDELL LARSON
Of Counsel for Appellee

It is stipulated that this application may be granted by this Court with the consent of appellant.

HORACE W. B. SMITH
GEO. A. WORK
Counsel for Appellant

Citations

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1933

No.

ALICE ASCHENBRENNER,
Petitioner,
vs.
UNITED STATES FIDELITY & GUARANTY CO.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The undersigned, on behalf of Alice Aschenbrenner, San Francisco, California, prays that a writ of certiorari issue to review the judgment of the Circuit

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Randell Larson of counsel for the appellee, and good cause therefor appearing,

IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including November 11th, 1933; and in the event the petition for a writ of certiorari to be made by the appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

WM. H. SAWTELLE
United States Circuit Judge

Dated, San Francisco, California
Sept. 28, 1933

[Endorsed]: Filed Sep. 28, 1933. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

[Title of Cause and Number.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eighty-eight (88) pages, numbered from and including 1 to and including 88, to be a full, true and correct copy of the entire record of the above entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco in the State of California, this 29th day of September, A. D. 1933.

[Seal] PAUL P. O'BRIEN,

Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 11, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

NOV 9
CHARLES ELMORE

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1933

No. 578

ALICE ASCHENBRENNER,
Petitioner,

vs.

UNITED STATES FIDELITY & GUARANTY CO.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

ALLEN G. WRIGHT,
Mills Building, San Francisco,
Attorney for Petitioner.

RANDELL LARSON,
WRIGHT & WRIGHT & LARSON,
Mills Building, San Francisco,
Of Counsel.

Court of Appeals for the Ninth Circuit in a proceeding therein entered June 26, 1933; reversing the judgment of the District Court, Northern District of California, Southern Division, after a trial by jury. (R. 83-4). A petition for a rehearing was denied by the Circuit Court of Appeals on September 6, 1933. (R. 85.)

OPINION BELOW.

The opinion of the Circuit Court of Appeals is reported in 65 Fed. (2d) 976. It is included in the record at pages 65 to 83.

THE CASE.

Petitioner sued respondent on a policy of accident insurance in which her husband was the insured and she was the beneficiary. The policy provided for a principal payment in case of loss of life resulting from accidental bodily injuries, and for double indemnity in the following language:

> "The amounts payable in all the foregoing schedules shall be double if 'such injury' is sustained by the insured,
>
> (1) While a passenger in or on a public conveyance (including the platform, steps, or running board thereof) provided by a common carrier for passenger service." (R. 4.)

The insured, who, it was conceded, had a railroad ticket in his pocket, jumped on a train after it had

started. He stood with both feet on the lower step of the car and inside the vestibule. While so standing he was brushed off by another person, sustaining injuries from which he died.

At the trial in the District Court respondent conceded the accidental death and its liability for the single indemnity. A trial by jury resulted in a verdict for double indemnity. (R. 7.) Judgment was entered by the District Court in conformity with the verdict. (R. 8.) The Circuit Court of Appeals reversed the judgment of the District Court, and remanded the case with instructions to enter a judgment for a smaller sum, the amount of the single indemnity. (R. 83-4.)

CONSTITUTIONAL QUESTION.

The Circuit Court of Appeals in setting aside the verdict of the jury, assuming to pass upon the issues of fact, and directing a judgment for a lesser amount, notwithstanding the verdict, violated the provisions of the Seventh Amendment to the United States Constitution, which provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Under the provisions of this amendment to the Constitution, as interpreted by this court, the Circuit Court of Appeals was prohibited from directing a

judgment, notwithstanding the verdict, based upon its own determination of the facts of the case. In doing so it presumed upon the prerogatives of the jury, and violated the right guaranteed by the Constitution.

In setting aside the verdict of the jury, or the judgment of the trial court, for errors of law committed at the trial, the Appellate Court may not re-examine the facts and render its own verdict, but must order a new trial.

Slocum v. New York Life Insurance Co., 228 U. S. 364, 33 Sup. Ct. Rep. 523;

Fidelity Title & Trust Co. v. DuBois Electric Co., 253 U. S. 212, 40 Sup. Ct. Rep. 514.

See also:

Glynn v. Krippner (C. C. A. 8), 60 Fed. (2d) 406.

OTHER QUESTIONS PRESENTED.

In addition to the constitutional question presented in this petition, the decision of the Circuit Court reversing the judgment of the District Court for alleged errors of law committed at the trial, considered on its merits, presents the following important questions:

1. Should double indemnity provisions of accident insurance policies be construed in accordance with the same principles of law applicable to other provisions of the policies, and

2. Is the word "passenger", as used in the policy, limited to the strict, technical definition announced in public carrier cases where claims for negligence, based

on the failure to exercise that high degree of care owing a passenger by a public carrier, are involved, or should the word "passenger", as used in the policy, be construed, as other terms of the policy, in its plain, ordinary, and popular sense?

THE FACTS OF THE CASE.

The facts, as stated by the Circuit Court of Appeals, are, in part, as follows:

On the morning of October 29, 1931, the insured and a friend, Mr. Ishem, arrived at the Southern Pacific Railway station in Burlingame, California, in a taxicab. The cab drew up at a distance of 25 to 40 feet from the train, which was just commencing to pull out of the station. The insured and his companion commenced running for the train across the station platform, somewhat on a diagonal. Ishem was on the left (toward the front end of the train) and a little ahead. When the two men reached the train, it was moving at a rate of speed estimated at from seven to ten miles an hour. The vestibule doors were open. The insured jumped upon the lower step, his right hand grasping the handrail, and while standing there he was carried to where Ishem stood. The Circuit Court stated:

> "The cause of the accident, as indicated by the testimony of three of the witnesses, was that as the train moved forward, carrying the decedent [insured] to the point where Ishem stood, the decedent's overcoat or the small part of the decedent's body outside of the vestibule, brushed

against Ishem and caused the decedent to loose his hold and fall. From the time he jumped on the train until he was carried to the point where Ishem stood, the decedent was standing with both feet on the lower step of the car and inside the vestibule, except for a small part of his body, which was outside. The decedent was carrying his overcoat over his left arm and a brief case in his right hand. After he was on the step he 'apparently started to change hands with his overcoat or brief case'." (R. 67.)

THE CONSTRUCTION OF THE CONTRACT BY THE CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals, conceding a conflict in the authorities, applied to the word "passenger" in the insurance policy the strict, technical construction of public carrier cases. It held, that before the insured could bring himself within the terms of the insurance contract, it was not sufficient that he stand on the steps, or running board, or platform of the conveyance, but he must first have reached "a place of safety", as defined in negligence cases against carriers. The citations and quotations relied upon in the Circuit Court's opinion define such "a place of safety" as the "inside of a car". For example, White (Personal Injuries on Railroads), as quoted by the Circuit Court, states:

> "Nor does a person become a passenger, who gets on a train after it has started to move, until he actually reaches a place of safety inside the car." (R. 75-6.)

In determining the limitations of the double indemnity clause of the policy, the Circuit Court of Appeals quoted authoritatively the following:

> "The theory of this clause [double indemnity] is that the interior of a passenger car is a place of exceptional safety, and in view of the slight risk to one seated there, the insurance company can contract to pay a double indemnity in the event of injury or death." (R. 80-81.)

and announced that the above quoted "observations regarding the *reason* for the rule—namely, that a passenger is in an exceptionally safe situation—are in point here". (R. 81.)

To so limit the word "passenger" as used in the policy to a person "in an exceptionally safe situation" is wholly to negative the language of the policy "including the platform, steps, or running board". The insurance company inserted that language in its policy with the purpose of assuming a broader obligation than would have rested upon it had that language been omitted.

THE POLICY BROADENS THE MEANING OF THE WORD "PASSENGER".

The language inserted by the insurance company in its policy extended the coverage beyond the "zone of safety" defined in negligence cases against carriers. The language of the policy, "while a passenger *in* or *on* a public conveyance (including the *platform, steps,* or *running board* thereof)" broadened the meaning

of the word "passenger" beyond the technical "place of safety" limitation adopted in carrier cases.

The Circuit Court relied primarily on a rule announced in Cooley's Briefs on Insurance, which the opinion quotes as follows:

> "Policies usually provide for the payment of double indemnity if the injury causing disability or death is received under certain specified conditions. One of the most common provisions is one that provides for double indemnity if the injury is received while riding as a passenger in any conveyance intended for the transportation of passengers. In determining who is a passenger within such a clause, the same rules are applied as would govern if the action was (were) against the carrier." (R. 70-71.)

But the rule stated by Cooley was confined to policies reading "while riding as a passenger *in* any conveyance". The policy here involved is not so restricted. The insurance company, by the use of the much more inclusive language *in or on, including the platform, steps, or running board*, deliberately broadened the meaning of the word "passenger" beyond the limitations of the Cooley rule. The insurance company specifically extended the insurance coverage to circumstances that would have precluded recovery against public carriers, and deliberately extended its double indemnity liability beyond the limitations of the rule applicable in carrier cases.

REASONS FOR GRANTING WRIT.

1. **The Circuit Court of Appeals violated a constitutional right in reversing and reducing the judgment of the District Court, notwithstanding the verdict, and exceeded its authority in doing more than to order a new trial.**

Slocum v. New York Life Insurance Co., supra.

2. **The Circuit Court of Appeals invaded the province of the jury in substituting its own findings of fact.**

The court below conceded as established facts that decedent jumped upon the lower step of the car, and "while standing there he was carried to where Ishem stood"; "from the time he jumped on the train until he was carried to the point where Ishem stood, the decedent was standing with both feet on the lower step of the car and inside the vestibule, except for a small part of his body, which was outside"; while so standing apparently started to change hands with his overcoat or brief case; and that "decedent's overcoat or the small part of the decedent's body outside of the vestibule, brushed against Ishem and caused the decedent to loose his hold and fall". (R. 67.) These facts were necessarily found by the jury in its verdict in following the instructions given by the trial court.

Later on the court substituted a different conclusion of fact as follows:

> "His attempt to board the train and his fall therefrom were in reality parts of the same operation—an operation by which the decedent attempted, but unsuccessfully attempted, to attain the status of passenger." (R. 78.)

If the insured reached a position of stable equilibrium on the steps, even momentary—if he "was stand-

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ing there"—the conclusion of the Circuit Court cannot logically follow. There was implied in the verdict of the jury a finding that the insured did obtain a position of stable equilibrium on the steps of the car and that he was later thrown from the car by reason of being subsequently jostled by another person, and there was evidence to support this conclusion. The Circuit Court virtually made a new finding of fact different from and inconsistent with that found by the jury.

It is the prerogative of the jury to determine all questions of fact and the court shall not assume, directly or indirectly, to take from the jury such prerogative.

Walker v. New Mexico & S. P. R. Co., 165 U. S. 593, 17 Sup. Ct. Rep. 421;

Baylis v. Travelers' Ins. Co., 113 U. S. 316, 5 Sup. Ct. Rep. 494.

The decision of the Circuit Court of Appeals, considered on its merits, presents additional reasons for the granting of this writ.

3. An important question of general law is involved.

The wording of the insurance policy as quoted above is frequently if not usually found in general accident policies. The terms of accident insurance policies are being constantly broadened by insurance companies to cover additional risks, with double indemnity provisions as additional protection to the insured. Whether the language of such a policy should receive a strict and technical construction to defeat the policy or a liberal construction to support it, and whether the

double indemnity provisions of such a policy are subject to the same general rule of construction as other provisions of the policy, or subject to a different rule of construction, are questions of general public interest.

It is reasonable to assume that insurance companies in extending their policies to cover additional risks and inserting double indemnity provisions in broader terms and with fewer exceptions and limitations, purposely do so to make the policies more attractive to prospective policy holders. The question of construction of such policies—whether the language used should receive a liberal construction to support the policy, or a restricted construction which tends to negative the broader language selected by the insurance companies—is one of real public importance.

4. There is a conflict in the decisions.

As stated by the Circuit Court, there is a conflict in the authorities and the adjudicated cases dealing with the precise point are not numerous.

Most of the cases cited in the court's opinion were carrier cases involving claims for negligence.

Several Circuit Courts of Appeal have construed insurance policies containing somewhat similar provisions in considering cases involving accidents in public elevators. These decisions are in substantial conflict with the decision in the case at bar.

The Sixth Circuit (in the consolidated cases of *London Guarantee & Accident Co. v. Ladd; Preferred*

Accident Insurance Co. v. Ladd, 299 Fed. 562) held that insured was a passenger within a passenger elevator when he walked into an open elevator shaft. The court held that a double indemnity clause of an accident insurance policy must be construed by the same rules applicable to other provisions of the policy, and where the language is susceptible of two meanings it must be construed liberally in favor of the insured and against the insurance company which drew the policy.

The Third Circuit (in *Preferred Accident Ins. Co. v. Muir,* 126 Fed. 926) in passing on a double indemnity provision of a policy refused to adopt a restricted interpretation which would have precluded recovery to a passenger while on the car platform. The court held that insurance companies are presumed to incorporate in their policies all desired limitations covering undesirable risks and it is not for the courts to interpolate exceptions into the policies.

Policies frequently contain provisions excepting liability for injuries received in getting on or off a moving train (see Appendix), but the policy here involved contained no such exception. The court below has, in substance, read into the policy an exception exempting liability to insured when getting on a moving train until he shall first have reached a place of safety within the car.

The court below definitely rejected a plain, ordinary, or popular sense definition of the term "passenger" and adopted a restricted and technical definition of

the word. The Eighth Circuit (*Aetna Life Insurance Co. v. Davis,* 191 Fed. 343) approved an instruction giving to the words "'while a passenger in an elevator' the meaning they would in common acceptation be held to have".

One state court case, almost identical with the case at bar both as to the provisions of the policy and as to the facts, is in direct conflict. The insured there was held to be a passenger under a double indemnity clause when he stepped with but one foot on the platform of the moving train.

Fidelity & Casualty Co. v. Morrison, 129 Ill. A. 360.

5. The decision is in conflict with general insurance law.

The decision of the Circuit Court of Appeals is in conflict with the following rules of general insurance law sanctioned by the great weight of authority.

a. Insurance contracts, like other contracts, are to be taken and understood in their plain, ordinary, and popular sense.

Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 14 S. Ct. Rep. 379, at p. 381.

b. The language of an insurance contract is that of the company and in case of doubt the meaning of its own words should be resolved against it.

Mutual Life Ins. Co. v. Hurni Packing Co., 263 U. S. 167, 44 S. Ct. Rep. 90, at p. 91.

Wherefore, it is respectfully urged that this petition for a writ of certiorari to review the judgment of

the Circuit Court of Appeals for the Ninth Circuit be granted.

Dated, San Francisco, California,
November 6, 1933.

ALLEN G. WRIGHT,
Attorney for Petitioner.

RANDELL LARSON,
WRIGHT & WRIGHT & LARSON,
Of Counsel.

(Appendix Follows.)

Appendix

Insurance policies containing provisions limiting liability, as suggested in the petition (page 12), are found in a number of cases. The following excerpts from a few such cases are illustrative:

1. (*Sawtelle v. Railway Pass. Assurance Co.*, 15 Blatchf. 216, 21 Fed. Cases 12,392.) "standing, riding or being upon the platform of moving railway coaches, or entering or attempting to enter, leaving or attempting to leave, any public conveyance using steam as a motive power, while the same is in motion, are hazards not contemplated by the contract."

2. (*Standard Life & Accident Ins. Co. v. McNulty*, 157 Fed. 224 (C. C. A. 8).) Double indemnity provided "if such injuries are sustained by reason of the wrecking of a passenger car * * * while the insured is actually within it riding as a passenger". The policy also provided: "This insurance does not cover * * * injuries sustained * * * while entering, or leaving, or trying to enter or leave, any moving conveyance."

3. (*Standard Life & Accident Ins. Co. v. Thornton*, 100 Fed. 582 (C. C. A. 6).) "The contract did not cover * * * death or disability resulting * * * from * * * entering or trying to enter or leave a moving conveyance using steam as a motor, or while riding on the platform or steps of any railway car."

4. (*Hull v. Equitable Acc. Ass'n* (Minn.), 42 N. W. 936.) "Standing, being or riding upon the platform of moving railway coaches (other than street cars), or riding in any other place not provided for the transportation of passengers, or entering or attempting to enter or leave any public conveyance using steam as the motive power,

while the same is in motion, * * * are hazards not contemplated or covered by this certificate."

5. (*Preferred Acc. Ins. Co. v. Muir,* 126 Fed. 926 (C. C. A. 3).) "If such injury shall be received by the insured while riding as a passenger in or on a public conveyance * * * then the amount to be paid * * * shall be double the amount which would * * * be otherwise payable * * *. The double indemnities accruing * * * shall not, however, be applicable to any injury * * * which may result from an attempt to enter or leave any of the conveyances therein specified."

6. (*London Guarantee & Accident Co. v. Ladd* (C. C. A. 6), 299 Fed. 562 (consolidated cases).)

One policy provided:

"The amount to be paid * * * shall be double * * * if such injuries are sustained while riding as a passenger in a car intended for the use of passengers, and being in or upon any passenger car on a railway using steam, cable, or electricity as a motive power * * *. Double payments * * * shall not apply to any accident or injury, fatal or otherwise, sustained while getting on or off or being upon the step or steps of any railway or street railway car."

The other policy provided:

"If such bodily injury is sustained by means as aforesaid (1) while the insured is a passenger and is in or upon any railway (or street railway) passenger car (including the platform, steps, or running board thereof) * * * the amount to be paid shall be double the sum which would otherwise be payable * * *. But any accident or injury, fatal or otherwise, sustained while getting on or off of any railway (or street railway) passenger car shall be covered only for single indemnity."

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1933

No. 578.

ALICE ASCHENBRENNER,
Petitioner,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONER.

ALLEN G. WRIGHT,
RANDELL LARSON,
Mills Building, San Francisco, California,
Attorneys for Petitioner

WRIGHT & WRIGHT & LARSON,
Mills Building, San Francisco, California,
Of Counsel.

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In the Supreme Court
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No. 578

ALICE ASCHENBRENNER,
Petitioner.

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY,
Respondent.

BRIEF FOR PETITIONER.

STATEMENT OF CASE.

This case comes to this Court on a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Ninth Circuit.

Petitioner sued respondent on a policy of accident insurance in which her husband was the insured and she was the beneficiary. The policy provided for a principal payment in case of loss of life resulting from accidental bodily injuries, and for double indemnity in the following language:

> "The amounts payable in all the foregoing schedules shall be doubled if 'such injury' is sustained by the insured.

(1) While a passenger in or on a public conveyance (including the platform, steps, or running board thereof) provided by a common carrier for passenger service." (R. 4.)

The insured, who, it was conceded, had a railroad ticket in his pocket, jumped on a train after it had started. He stood with both feet on the lower step of the car and inside the vestibule. While so standing he was brushed off by another person, sustaining injuries from which he died.

At the trial in the District Court (Northern District of California, Southern Division) respondent conceded the accidental death and its liability for the single indemnity. A trial by jury resulted in a verdict for double indemnity. (R. 7.) Judgment was entered by the District Court in conformity with the verdict. (R. 8.) The Circuit Court of Appeals reversed the judgment of the District Court and remanded the case with instructions to enter a judgment for a smaller sum, the amount of the single indemnity. (R. 83-4.) A petition for a rehearing was denied by the Circuit Court of Appeals. (R. 85.)

OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 65) is reported in 65 Fed. (2d), 976.

THE FACTS.

The facts, as stated by the Circuit Court of Appeals, are, in part, as follows:

On the morning of October 29, 1934, the insured and a friend, Mr. Ishem, arrived at the Southern Pacific Railway station in Burlingame, California, in a taxicab. The cab drew up a distance of 25 to 40 feet from the train, which was just commencing to pull out of the station. The insured and his companion commenced running for the train across the station platform, somewhat on a diagonal. Ishem was on the left (toward the front end of the train) and a little ahead. When the two men reached the train, it was moving at a rate of speed estimated at from seven to ten miles an hour. The vestibule doors were open. According to the brakeman's testimony they were open because "the train was not out of the station." The insured jumped upon the lower step, his right hand grasping the handrail, and while standing there he was carried to where Ishem stood. The Circuit Court stated:

> "The cause of the accident, as indicated by the testimony of three of the witnesses, was that as the train moved forward, carrying the decedent [insured] to the point where Ishem stood, the decedent's overcoat or the small part of the decedent's body outside of the vestibule, brushed against Ishem and caused the decedent to loose his hold and fall. From the time he jumped on the train until he was carried to the point where Ishem stood, the decedent was standing with both feet on the lower step of the car and inside the vestibule, except for a small part of his body, which was outside. The decedent was carrying his overcoat over his left arm and a brief case in his right hand. After he was on the step he 'appar-

ently started to change hands with his overcoat or brief case.' " (R. 67.)

THE ISSUES IN THE CASE.

The issues presented in this case are threefold. They are as follows:

1. *The proper construction of the word "passenger" as used in the double indemnity provision of the insurance policy.*

The Circuit Court of Appeals erred in limiting the term "passenger," as used in the policy, to the strict and technical definition announced in public carrier cases where claims for negligence, based on the failure to exercise that high degree of care owing a passenger by a public carrier, are involved. In so doing, the Circuit Court disregarded the context of the policy, wherein the word "passenger" was used, and interpolated exceptions into the policy which the insurance company had not written there, and which were inconsistent with the language of the policy itself.

2. *The facts as found by the jury.*

The Circuit Court of Appeals erred in that it invaded the province of the jury when it made findings of fact of its own, which influenced its decision, instead of accepting the facts as found by the jury and implicit in their verdict.

3. *The constitutional question.*

The Circuit Court of Appeals erred in that it violated a Constitutional right of the petitioner in reversing and reducing the judgment of the District Court,

notwithstanding the verdict, and exceeded its authority in doing more than to order a new trial.

ARGUMENT.

I.

THE CONSTRUCTION OF THE WORD "PASSENGER."

The construction adopted by the Circuit Court of Appeals.

The insurance policy provided for double indemnity in case of injury to insured sustained "while a passenger in or on a public conveyance (including the platform, steps, or running board thereof) provided by a common carrier for passenger service." The Circuit Court of Appeals, conceding a conflict in the authorities, applied to the word "passenger," as used in this double indemnity provision of the policy, the strict, technical construction of public carrier cases. That Court stated that the term "passenger" is used primarily in contracts, whether express or implied, between carriers and those who are transported by them, and that, for the proper definition of the term, reference must be had to the law of carriers. (R. 70.) The Court held, that in boarding a train after it had started, it was not sufficient that insured, to bring himself within the terms of the insurance contract, stand on the steps, or running board, or platform of the conveyance, but he must first have reached "a place of safety," as defined in negligence cases against carriers. The citations and quotations relied upon in the Circuit Court's opinion define such "a place of safety" as the "inside of the car." For example, White (Per-

sonal Injuries on Railroads, Vol. II, §§556 and 783), as quoted by the Circuit Court, states:

> "Nor does a person become a passenger, who gets on a train after it has started to move, until he actually reaches a place of safety inside the car." (R. 75-6.)

The Circuit Court also quoted authoritatively from *Merrill v. Eastern R. Co.*, (1 N. E. 548, 550), as defining the "place of safety" rule applicable to the case at bar. In this quotation is found this statement:

> "We may admit that if he had reached a place of safety, and *seated himself inside the car*, the bailment of his person to the defendant would have been accomplished, and that he would not have been prevented from asserting such rights because of his improper way of getting upon the train." (Italics ours.) (R. 79.)

The reason for the application of a restricted interpretation of the term "passenger" in a passenger-carrier case is obvious. In such a case there is involved not alone the failure of the carrier to observe that high degree of care which a public carrier owes to its passengers, and the question of its negligence in not so doing, but also the question of the contributory negligence of the passenger. If a person is negligent in boarding a train after it has started, it seems reasonable and proper that he first place himself in a position of safety within the conveyance provided for his use before he may predicate a claim for damages against the carrier, based upon the failure of the carrier to exercise toward him that high degree of care which a carrier owes its passengers. In other words,

he must first have completely shed the cloak of contributory negligence. So, too, a person negligently standing on the steps of a railway passenger car could not claim as against the carrier damages for an accident, without proving an intervening act of negligence on the part of the carrier. But the reason for the rule as applied to carrier cases is not applicable to the instant case. The question of possible negligence of the carrier, or of the insured, is not here involved. The insurance company did not attempt to restrict its coverage to the narrower field where the insured, or his heirs, could have recovered damages against the carrier. The language which the insurance company inserted in its policy plainly extended the coverage beyond the "zone of safety" as defined in negligence cases against carriers.

To limit the word "passenger" as used in the policy to "a place of safety inside the car" or to one who has "*seated himself inside the car*," as defined by White and in the *Merrill* case, quoted above, is to annul the language of the policy "in or on a public conveyance (including the platform, steps, or running board thereof)."

The Circuit Court's reason for its construction.

The Circuit Court of Appeals stated that the *reason* for the rule upon which it relied was that "a person acquiring the full status of a passenger is known to occupy an extremely safe situation, while one who is attempting to board a moving train is in a precarious state." (R. 80.) The Circuit Court frankly assumed that the reason the insurance com-

pany contracted to pay double indemnity was because this "place of safety" zone, as announced in carrier cases, is such an exceptionally safe situation for a passenger to occupy.

In support of its conclusion that the double indemnity provision of the policy was thus meant to be strictly construed, the opinion of the Circuit Court of Appeals contains several quotations. One authority so quoted (*Anable v. Fidelity & Casualty Co.*, 63 Atl. 92, 93) contains this statement:

> "The risk for which the defendant contracted to pay double insurance, was without doubt regarded as distinctly less hazardous than the single insurance risk. A passenger in a public conveyance who keeps himself within a car, or on a steamboat, is regarded as subjected to the slightest risk." (Italics ours.)

The Circuit Court also quoted from Fuller's "Accident and Employers' Liability Insurance, Co." (Chap. 4, p. 334), the following, as determining the limitations of the double indemnity clause of the policy:

> "The theory of this clause [double indemnity] is that the interior of a passenger car is a place of exceptional safety, and in view of the slight risk to one seated there, the insurance company can contract to pay a double indemnity in the event of injury or death." (R. 80-81.)

In connection with the Fuller quotation, the Circuit Court then added the following:

> "It is true that the learned author was not there discussing a policy containing the terms that

> form part of the policy in the instant case; but his observations regarding the *reason* for the rule namely, that a passenger is in an exceptionally safe situation—are in point here." (R. 81.)

The authority upon which the Circuit Court of Appeals apparently placed its chief reliance in support of its restricted construction of the double indemnity provision of the policy, is Cooley's Briefs on Insurance. (2d ed. Vol. 6, p. 5590.) The opinion of the Circuit Court quotes from Cooley the following:

> "Policies usually provide for the payment of double indemnity if the injury causing disability or death is received under certain specified conditions. One of the most common provisions is one that provides for double indemnity if the injury is received while riding as a passenger in any conveyance intended for the transportation of passengers. *In determining who is a passenger within such a clause, the same rules are applied as would govern if the action was (were) against the carrier.*" (R. 70-71.)

The quotation from the *Anable* case, given above, refers to one "who keeps himself within a car"; the Fuller quotation refers to one seated in the *interior* of a passenger car; while the rule stated by Cooley was confined to policies reading "while riding as a passenger *in* any conveyance." The policy involved in the instant case is not so restricted. The insurance company, in adopting the language "in or on a public conveyance (including the platform, steps, or running board thereof)" deliberately broadened the meaning of the word "passenger" beyond the limitations of the

Cooley rule. The policy not only provided for insurance coverage in favor of a passenger "on a public conveyance" as well as "in" it, but to give added force to the broader field implicit in the use of the word "on," it deliberately added the parenthetical phrase "including the platform, steps, or running board thereof."

To limit the word "passenger," as used in the policy, to one while riding "in any conveyance," upon the authority of the Cooley quotation, or to one who "keeps himself within the car," as announced in the Anable quotation, or "to one seated" in the interior of a passenger car, as suggested in the Fuller quotation, is to render futile the broad language of the policy which describes a "passenger" as including not only one "in a public conveyance," but also one "on a public conveyance (including the platform, steps, or running board thereof)."

The Circuit Court of Appeals interpolated exceptions into the policy.

The double indemnity provisions of the policy did not restrict insured to "a place of safety," as defined by carrier cases. To attribute to the insurance company the intention to limit the double indemnity risk to such "a place of safety," as was done by the Circuit Court, is not only to nullify the language of the policy, but to interpolate into the policy an unwarranted exception. Had such an exception been intended by the insurance company, apt words to express it could have been found.

> "While the double indemnity clause may have been intended particularly to cover accidents oc-

curring in a comparatively safe place, or where there are special safeguards that are likely to reduce the probability of injury, no such limitation can be found in the language used."

London Guarantee & Accident Co., Ltd. v. Ladd (C. C. A. 6), 299 Fed. 562, 564.

Neither was there any provision in the policy excepting the company from liability in the event insured was injured while getting on or off a moving conveyance. Had such an exception been intended by the insurance company, presumably it would have been expressed in the policy. That policies frequently do contain such exceptions is shown by the excerpts from a few such policies as set out in the Appendix to this brief, p. i.

Courts generally have held that if an exception to liability had been intended by the insurance company it is to be presumed that such an exception would have been written into the contract.

"Yet the policy—which was prepared by the company itself—does not in terms except from the risk * * * injuries * * * occurring while the insured is upon the platform of a moving car * * * The company well knew how to protect itself from undesirable risks. If, then, it intended to exclude from the benefit of the policy death resulting from an injury occurring while the insured was upon the platform of a moving car, it was easy to say so. Had this been the intention, presumably it would have been expressed. We think that it is not for the court to interpolate into the policy such an exception."

Preferred Accident Ins. Co. v. Muir (C. C. A. 3), 126 Fed. 926, 928.

The same principle has been enunciated by the California Courts, from whence this action emanates:

> "If it had been intended to restrict the insured to any particular part of the conveyance, apt words to express such intention could have been readily found and used."
>
> *Berliner v. Travelers' Ins. Co.*, 121 Cal. 458, 462.

The correct meaning of the word "passenger" as used in the policy.

The wording of the insurance policy here involved is frequently found in general accident policies. In drafting the double indemnity provision of the policy in question, it is fair to assume that the insurance company was familiar with the legal principles stated by Cooley (referred to previously) and announced in the carrier-negligence cases. It is also fair to assume that in deliberately adopting the broad language of the policy in the instant case the company did so in order to extend its liability and thereby make the policy more attractive to prospective policy holders.

The policy in this case contains its own evidence that the word "passenger" was not there used in the narrow sense which the word has acquired in the carrier-negligence cases to meet the exigencies of those cases. The selection of the word "on" the public conveyance, as well as "in" it, by the insurance company in describing the places where accidents might arise which were to be covered, and the additional reference to the platform and steps of the conveyance, indicate a deliberate intention on the part of the insurer to cover a broader field than the inside of a passenger car.

Instead of using the word "passenger" in any limited sense, the effort to use that term in its ordinary and popular sense is manifest. The company intended to insure the policy holder against any accident that might occur to him while on the platform, steps, or running board, or on or in any public conveyance provided by a common carrier for passenger service, providing the policy holder was one who had paid or expected to pay his fare. The company did not intend to insure the policy holder if traveling as a tramp, riding surreptitiously the brakebeams of a railroad car, or if traveling as an employee of the carrier, such as a train brakeman, or as a railway postal clerk. In *Wood v. General Accident Ins. Co.*, 156 Fed. 982, the trial Court held a railway postal clerk was not a "passenger" under the terms of an insurance policy. The trial Court said:

> "It is clear that the words 'actually riding as a passenger' and 'actually riding as passenger in or on any regular passenger conveyance' meant the indemnity should apply to the case of a passenger in the ordinary, common, everyday use of that word, and to an injury received while such person was in or on a regular passenger conveyance * * * and any other construction is to inject into the words used a meaning that is not their common, ordinary meaning."

Upon appeal of this case the Third Circuit Court of Appeals affirmed the decision of the trial Court (in 160 Fed. 926), stating:

> "As these words are ordinary words, the meaning of which is plain, they should, of course, be understood and applied accordingly; and that a

> mail clerk at work in a mail car is not, in common apprehension, 'actually riding as a passenger in or on any regular passenger conveyance,' cannot, we think, be reasonably questioned."

It was this ordinary and popular meaning of the term "passenger" which the policy holder had the right to claim was intended when used with the words "in or on a public conveyance (including the platform, steps, or running board thereof)."

Authorities in support of petitioner's interpretation

This Court has recognized the rule that the language of an insurance contract, being that of the insurance company, the meaning of its own words, in case of doubt, should be resolved against it.

> *Mutual Life Ins. Co. v. Hurni Packing Co.*, 263 U. S. 167, 44 S. Ct. Rep. 90.

Insurance contracts, like other contracts, are to be taken and understood in their plain, ordinary, and popular sense.

> *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 14 S. Ct. Rep. 379, at p. 381.

The Eighth Circuit Court of Appeals recognized this rule of construction in *Aetna Life Insurance Co. v. Davis*, 191 Fed. 343, 345, wherein was involved the question whether insured, injured in entering an elevator, was a passenger within the terms of the policy. The Court approved an instruction to the jury "to give to the words 'while a passenger in an elevator' the meaning they would in common acceptation be held to have."

Likewise the Sixth Circuit Court of Appeals (in the consolidated cases of *London Guarantee & Accident Co., Ltd. v. Ladd* and *Preferred Accident Insurance Co. of N. Y. v. Ladd*, 299 Fed. 562, 564), in construing the language of one of the insurance policies there involved, which read "while a passenger and is within a passenger elevator," held deceased was a passenger within the meaning of the policy when he entered the elevator shaft with intent to ride on the elevator as a passenger, although not actually entering the elevator itself. In that case the Court announced that the double indemnity provision of the policy should be construed in accordance with the same principles of law applicable to other provisions of the policy. The Court said:

> "It has been urged that the usual rules of interpretation of the language of an insurance policy most strongly against the company should not apply to a double indemnity clause. Although it is true that the social consequences of excluding the beneficiary from any recovery may be much graver than merely excluding him from the double indemnity benefits, and in a sense the double indemnity is exceptional and granted only under the specified conditions, nevertheless the double indemnity clause is but a part of a single obligation. The entire policy is drawn by the company. This provision, therefore, must be construed in the same manner as the other provisions of the policy."

Petitioner in presenting this case before the Circuit Court of Appeals, originally, and in its petition for a rehearing, cited these elevator cases wherein the word

"passenger" was construed. The Circuit Court was apparently unimpressed with these citations. Nevertheless, petitioner respectfully urges that if the word "passenger" as found in the double indemnity provision of an insurance policy may rightfully be construed in its plain, ordinary, and popular sense where the injury occurs in a public elevator, the insured may rightfully claim a like construction where the injury occurs "in or on a public conveyance."

> "We see no distinction in principle between the degree of care required from a carrier of passengers horizontally, by means of railway cars or stage coaches, and one who carries them vertically, by means of a passenger-elevator."
>
> *Mitchell v. Marker*, (C. C. A. 6), 62 Fed. 139. 142.

The case at bar is almost identical with a case decided by a state Court in Illinois, both as to the provisions of the policy and as to the facts. (*Fidelity & Casualty Co. v. Morrison*, 129 Ill. A. 360.) In that case the insured was held to be a passenger under the double indemnity clause of the policy when he stepped with but one foot on the platform of a moving train. The decision there reached is in direct conflict with the decision of the Circuit Court of Appeals.

II.

THE FACTS AS FOUND BY THE JURY.

The Circuit Court substituted its own findings for those of the jury.

The questions of fact were left to the jury for determination by the trial Court under suitable instructions. (R. 36-41.)

The important instruction given to the jury by the trial Court was (R. 39-40):

> "You are instructed that if you find from the evidence that the insured, Walter John Aschenbrenner, attempted on the 9th day of November, 1931, to get on board a public conveyance provided by a common carrier for passenger service and that at the time he made such attempt he held a ticket entitling him, by virtue of its issuance to him by such common carrier, to ride as a passenger upon said conveyance, and that at the time he attempted to get on board said conveyance, the conveyance was in motion and that he did, while the conveyance was in motion, *actually get on board* the same by reason of his lifting himself upon the steps and standing thereon with both of his feet upon a step of said conveyance while the same was in motion and holding with one hand to a hand rail attached to said conveyance for the purpose of enabling passengers to lift themselves to the step of said conveyance for the purpose of entering the same, and that the said insured did, while the said conveyance was in motion, *actually stand* with both feet upon a step of the conveyance and hold to said hand rail with one hand, and that while he was so standing and holding he *was thrown* from the said step, either

by reason of the increased motion of said conveyance or by being struck or jostled by another person attempting to get on board said conveyance, and that by reason of being so thrown he was hurled to the ground and thereupon and thereby suffered injuries from which he shortly died. then I instruct you that he was a passenger upon said conveyance at the time he was hurled therefrom and your verdict must be in favor of the plaintiff in the sum of $15,000." (Italics ours.)

There was implicit in the verdict of the jury, under this instruction, first, a finding that the insured did actually get on board the conveyance and did actually stand with both feet upon the step of the conveyance (and hold to the handrail with one hand), while it was in motion, and, secondly, a finding that while so standing and holding he was thrown from the conveyance by reason of being struck or jostled by another person attempting to get on board.

The Circuit Court of Appeals conceded the first finding when it said, in reciting the facts of the case:

"the decedent jumped upon the lower step, his right hand grasping the handrail, and, *while standing there,* he was carried to where Ishem stood. * * * From the time he jumped on the train until he was carried to the point where Ishem stood, the decedent *was standing with both feet on the lower step* of the car *and inside the vestibule,* except for a small part of his body, which was outside. * * * After he was on the step, he 'apparently started to change hands with his overcoat or brief case'." (Italics ours.) (R. 67.)

Later on in its opinion, the Circuit Court, however, substituted a different conclusion of fact as follows:

> "His attempt to board the train, and his fall therefrom were in reality parts of the same operation—an operation by which the decedent attempted, but unsuccessfully attempted, to attain the status of passenger." (R. 78.)

If the insured reached a position of stable equilibrium on the steps, even momentary—if he "was standing there"—the conclusion of the Circuit Court cannot logically follow.

The trial Court, under its instruction, left to the jury to determine if the accident occurred by reason of the increased motion of the train or by reason of being struck or jostled by another person attempting to get on board the conveyance. (R. 40.) There was no testimony tending to show that the accident occurred by reason of the increased motion of the train, while three witnesses testified that the accident occurred by reason of insured being struck or jostled by Ishem, who was attempting to board the conveyance. The verdict of the jury, therefore, implicitly found this latter fact to be the cause of the accident.

The Circuit Court of Appeals conceded this evidence when, in its opinion, it said:

> "The cause of the accident, as indicated by the testimony of three of the witnesses, was that, as the train moved forward, carrying the decedent to the point where Ishem stood, the decedent's overcoat or the small part of the decedent's body outside the vestibule, brushed against Ishem and

caused the decedent to loose his hold and fall." (R. 67.)

But disregarding this testimony, and the conclusion which the jury, by its verdict, necessarily found was the cause of the accident, the Circuit Court of Appeals announced this inconsistent conclusion:

> "The cause of his fall is not clear. While, as we have seen, three witnesses said that the decedent brushed against Ishem, the remaining witnesses did not know what caused him to fall." (R. 67.)

It was within the province of the jury to determine these questions of fact. The Circuit Court raised a doubt as to the findings of the jury—a doubt as to the cause of the fall of the insured, and a doubt as to whether insured in fact attained a position of stable equilibrium on the steps of the car, whether he did, in fact, "actually stand with both feet upon a step of the conveyance." (R. 40.) Having raised these doubts, the Circuit Court then invaded the exclusive province of the jury and asserted its own conclusions on the subject in the following language:

> "In the instant case, however, the event itself shows that decedent never reached a place of safety; else he would not have been killed! His position upon the lower step of the car was of so brief a duration, and his lack of equilibrium during that instant of time was so evident, that it would be paradoxical to say that the decedent had reached a place of safety at the time he fell off the car. His attempt to board the train, and his fall therefrom were in reality parts of the

same operation—an operation by which the decedent attempted, but unsuccessfully attempted, to attain the status of passenger." (R. 78.)

It is the prerogative of the jury to determine all questions of fact and the Court shall not assume, directly or indirectly, to take from the jury such prerogative.

Walker v. New Mexico & S. P. R. Co., 165 U. S. 593, 17 Sup. Ct. Rep. 421, 422.

"That we may be inclined to a conclusion thereon differing from that expressed by the jury in their verdict is no ground for disturbing such verdict, if there can be found anywhere in the record evidence sufficient to warrant the court in sending the case to the jury."

Commercial Travelers' Mut. Acc. Ass'n. v. Fulton (C. C. A. 2), 93 Fed. 621, 622.

"It is not for us to set aside their [the jury's] verdict merely because, if the same questions were submitted to us as triers of the facts upon the same record, we might have reached a different conclusion."

Heide v. Panoulias (C. C. A. 2), 188 Fed. 914. 920.

III.

THE CONSTITUTIONAL QUESTION.

The Circuit Court of Appeals in setting aside the verdict of the jury, assuming to pass upon the issues of fact, and directing a judgment for a lesser amount,

notwithstanding the verdict, violated the provisions of the Seventh Amendment to the United States Constitution, which provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Under the provisions of this amendment to the Constitution, as interpreted by this Court, the Circuit Court of Appeals was prohibited from directing a judgment, notwithstanding the verdict, based upon its own determination of the facts of the case. In doing so it presumed upon the prerogatives of the jury, and violated the right guaranteed by the Constitution.

In setting aside the verdict of the jury, or the judgment of the trial Court, for errors of law committed at the trial, the Appellate Court may not re-examine the facts and render its own verdict, but must order a new trial.

Slocum v. New York Life Insurance Co., 228 U. S. 364, 33 Sup. Ct. Rep. 523;

Fidelity Title & Trust Co. v. Dubois Electric Co., 253 U. S. 212, 40 Sup. Ct. Rep. 514.

See also:

Glynn v. Krippner (C. C. A. 8), 60 Fed. (2d) 406.

CONCLUSION.

It is respectfully urged that the decision of the Court below be reversed and the judgment of the trial Court affirmed.

Dated, San Francisco, California,
January 17, 1934.

ALLEN G. WRIGHT,
RANDELL LARSON,
Attorneys for Petitioner.

WRIGHT & WRIGHT & LARSON,
Of Counsel.

(Appendix Follows.)

Appendix

Insurance policies containing provisions limiting liability, as suggested in the accompanying brief (page 11), are found in a number of cases. The following excerpts from a few such cases are illustrative:

1. (*Sautelle v. Railway Pass. Assurance Co.*, 15 Blatchf. 216, 21 Fed. Cases 12,392.) "Standing, riding or being upon the platform of moving railway coaches, or entering or attempting to enter, leaving or attempting to leave, any public conveyance using steam as a motive power, while the same is in motion, are hazards not contemplated by the contract."

2. (*Standard Life & Accident Ins. Co. v. McNulty*, 157 Fed. 224 (C. C. A. 8).) Double indemnity provided "if such injuries are sustained by reason of the wrecking of a passenger car * * * while the insured is actually within it riding as a passenger." The policy also provided: "This insurance does not cover * * * injuries sustained * * * while entering or leaving, or trying to enter or leave, any moving conveyance."

3. (*Standard Life & Accident Ins. Co. v. Thornton*, 100 Fed. 582 (C. C. A. 6).) "The contract did not cover * * * death or disability resulting * * * from * * * entering or trying to enter or leave a moving conveyance using steam as a motor, or while riding on the platform or steps of any railway car."

4. (*Hull v. Equitable Acc. Ass'n* (Minn.), 42 N. W. 936.) "Standing, being or riding upon the platform of moving railway coaches (other than street cars), or riding in any other place not provided for the transportation of passengers, or entering or attempting to enter or leave any public conveyance using steam as the motive power, while the same is in motion, * * * are hazards not contemplated or covered by this certificate."

5. (*Preferred Acc. Ins. Co. v. Muir*, 126 Fed. 926 (C. C. A. 3).) "If such injury shall be received by the insured while riding as a passenger in or on a public conveyance * * * then the amount to be paid * * * shall be double the amount which would * * * be otherwise payable * * *. The double indemnities accruing * * * shall not, however, be applicable to any injury * * * which may result from an attempt to enter or leave any of the conveyances therein specified."

6. (*London Guarantee & Accident Co. v. Ladd*, (C. C. A. 6), 299 Fed. 562 (consolidated cases).)

One policy provided:

"The amount to be paid * * * shall be double * * * if such injuries are sustained while riding as a passenger in a car intended for the use of passengers, and being in or upon any passenger car on a railway using steam, cable, or electricity as a motive power * * *. Double payments * * * shall not apply to any accident or injury, fatal or otherwise, sustained while getting on or off or

being upon the step or steps of any railway or street railway car."

The other policy provided:

"If such bodily injury is sustained by means as aforesaid (1) while the insured is a passenger and is in or upon any railway (or street railway) passenger car (including the platform, steps, or running board thereof) * * * the amount to be paid shall be double the sum which would otherwise be payable * * *. But any accident or injury, fatal or otherwise, sustained while getting on or off of any railway (or street railway) passenger car shall be covered only for single indemnity."



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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1933

No. 578

ALICE ASCHENBRENNER,
Petitioner,

vs.

UNITED STATES FIDELITY & GUARANTY CO.,
Respondent.

ANSWER OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI.

BRANDENBURG & BRANDENBURG,
EDWIN C. BRANDENBURG,
National Savings & Trust Building, Washington, D. C.,
HORACE W. B. SMITH,
GEORGE A. WORK,
Mills Building, San Francisco, California,
Attorneys for Respondent.

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ANSWER OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI.

ANSWER TO CONSTITUTIONAL QUESTION.

The facts in the case are without dispute. They show in substance the effort of deceased to board a moving train which was traveling at a rate of speed of from seven to ten miles per hour when he gained contact with it, and his falling from the first step of the vestibule to his death during a period within which the train had traveled a distance of between twenty and thirty feet. These facts being without dispute, the question became purely one of law, as to

whether under such circumstances the deceased was a passenger at the time that he fell to his death. The overwhelming and practical unanimity of authority, as set out in the opinion of the Circuit Court of Appeals, is to the effect that he had not become a passenger, and the double indemnity provision of the policy applicable only to passengers was, therefore, not applicable to the deceased.

On reversal of a judgment at law in a jury case the court need not remand for a new trial if the case involves only propositions of law so that there is nothing to retry. (*Forged Steel Wheel Co. v. Lewellyn*, 251 U. S. 511, 64 Law Ed. 380.) Obviously if this were not the rule there would be no end to litigation.

Sending the present case back for a new trial would only redevelop the facts that have now been exhaustively presented by both sides, and if the trial court should decline to grant a verdict in favor of the defendant and the jury should render a verdict in favor of the plaintiff, the same routine would have to be observed again—an appeal, a reversal, a retrial and so on *ad infinitum*.

The remaining points raised by the petitioner are all fully considered in the opinion of the Circuit Court of Appeals and, therefore, we believe need not be alluded to by the respondent here in detail. The court aptly said, in answer to petitioner's position ~~petition~~ in that court, that full force should be given to the words "platform, steps or running board," and said further, "but equal force should be given to the words 'while a passenger.' If the appellee has not

brought herself within *all* the conditions precedent to recovery under the policy she cannot be awarded double indemnity."

The only case cited by the petitioner here in the trial court and in the Circuit Court of Appeals that apparently was even close to being in point, was *Fidelity & Casualty Co. v. Morrison*, 129 Ill. App. 360. The reasoning of that case is so much at variance with the overwhelming weight of authority, as that authority is presented in the opinion of the Circuit Court of Appeals, that it was rejected by the court. The case has never been cited as authority in any other case that we have been able to discover, nor has the holding been passed upon by the Supreme Court of Illinois. Suffice it to say that the remaining authorities cited by the petitioner here do not involve the question involved in the case at bar, namely, at what point one attempting to board a train which is in motion before the attempt is made, acquires the status of passenger thereon. In the case at bar no two answers to the question are possible. It is clear as a matter of law that the deceased did not acquire a place of safety, and there is nothing, therefore, for the jury to pass upon. This phase of the case is fully covered by the opinion of the Circuit Court of Appeals in the following language:

> "In the instant case, however, the event itself shows that decedent never reached a place of safety: else he would not have been killed! His position upon the lower step of the car was of so brief a duration, and his lack of equilibrium during that instant of time was so evident, that

it would be paradoxical to say that the decedent had reached a place of safety at the time he fell off the car. His attempt to board that train and his fall therefrom were in reality parts of the same operation—an operation by which the decedent attempted, but unsuccessfully attempted, to attain the status of passenger."

It is respectfully asked, therefore, that the petition for the writ of certiorari be denied.

Dated, San Francisco, California,
November 27, 1933.

BRANDENBURG & BRANDENBURG,
EDWIN C. BRANDENBURG,
HORACE W. B. SMITH,
GEORGE A. WORK,
Attorneys for Respondent.

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In the Supreme Court

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OCTOBER TERM, 1933

No. 578

ALICE ASCHENBRENNER,
Petitioner,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

BRANDENBURG & BRANDENBURG,
EDWIN C. BRANDENBURG,
National Savings & Trust Building, Washington, D. C.,
HORACE W. B. SMITH,
GEORGE A. WORK,
Mills Building, San Francisco, California,
Attorneys for Respondent.

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In the Supreme Court
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UNITED STATES FIDELITY & GUARANTY COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

I.

THE DECISION OF THE CIRCUIT COURT OF APPEALS UPON THE MERITS OF THE CASE IS CORRECT.

Upon the appeal to the United States Circuit Court of Appeals the appellant there, United States Fidelity and Guaranty Company, assigned three errors. They are as follows (Record pp. 48-49):

1. The trial court erred in denying appellant United State Fidelity and Guaranty Company's motion for a directed verdict, and in refusing to direct the jury to render its verdict in favor of the appellant

as to the double indemnity claim of the plaintiff under the policy of insurance involved in the action.

2. That the verdict of the jury is not sustained by the evidence.

3. That the court erred in refusing to give to the jury instructions requested by the appellant, Nos. 2, 4, 5, 6, 7 and 8, which instructions were duly requested of the court to be given to the jury, and which request was refused, and which refusal was duly excepted to by the defendant in the presence of, and before the retirement of, the jury to deliberate upon its verdict.

These instructions appear at pages 49, 50, 51 and 52 of the record in this court.

These errors are reassigned here.

The Circuit Court of Appeals found it unnecessary to consider the second and third assignments of error, inasmuch as it found the first assignment sufficient to reverse the judgment upon the ground that the undisputed evidence showed as a matter of law that the assured decedent, Aschenbrenner, was not a passenger at the time of the accident, and therefore not within the double indemnity provisions of the policy involved. These assignments have therefore never been passed upon.

The contention of the appellant was, in brief, that the word "passenger," as used in the formal written insurance contract, should be given its ordinary signification, as that signification appears in the law of carriers, because the pertinent provision of the double indemnity clause is:

> "(1) While a passenger in or on a public conveyance (including the platform, steps, or running board thereof) provided by a common carrier for passenger service."

The contention of the respondent Aschenbrenner was that the word "passenger" should receive a broader definition than this, one at least sufficiently broad to include the decedent in this case, but the precise limits of this definition have never been fixed by the respondent nor have the criteria by which it could be determined been suggested. In its brief in this court, at page 13, the respondent says, in speaking of the use of the word "passenger" in the policy involved:

> "Instead of using the word 'passenger' in any limited sense, the effort to use that term in its ordinary and popular sense is manifest."

Just what that ordinary and popular sense is, the petitioner does not make clear. In the sentence immediately following this one she seems to infer that anyone upon a passenger train, regardless of his condition, or regardless of how or when he got there, or on what part of the train he may be riding, if he has paid or expects to pay his fare, is a passenger. According to this view, one riding upon the brake beams who expected to pay his fare at some time during the journey, would be a passenger, and likewise one riding on top of the train. Although the petitioner does not fix it, she appreciates that somewhere there must be a limitation upon the definition of passenger of which she is speaking by stating: "The company did not intend to insure the policyholder if traveling as a tramp riding surreptitiously the brake beams of a railroad car, or if traveling as an employee of the

carrier, such as a train brakeman or as a railway postal clerk." There is no more reason for excluding these classifications from the petitioner's concept of the term "passenger" than there is for including the decedent in the concept. The petitioner appreciates that she is obliged to extend the meaning of the word "passenger" beyond that accorded it in the law of carriers, and accorded it with relation to public conveyances for passenger carriage, and appreciates further that the definition must not be made so broad or extreme as to be untenable, and therefore is put to finding some midway ground between the definition accorded the word in the law of carriers and the extreme definition to include anyone traveling upon a railroad train regardless of the circumstances or the place. To meet this dilemma the petitioner has arbitrarily fixed a definition to meet her own ends, and this definition finds no substantiation in any of the decided cases, as we shall point out in alluding to the cases cited by the petitioner.

The Circuit Court of Appeals rejected this concept of the petitioners, the respondent in that court, and stated what seems to be inescapably sound, that the word "passenger" as used in the policy involved, should be given the ordinary significance which it has in the law of carriers.

In this connection we wish to especially emphasize the wording of this important provision in the policy:

> "While a passenger in or on a public conveyance (including the platform, steps, or running board thereof) provided by a common carrier for passenger service."

It is impossible to conceive how the insurance company could have more explicitly stated that this double indemnity provision extended only to passengers on a public conveyance operated by a common carrier for passenger service than it has done here. The word "passenger" is used only with relation to a public conveyance and to one provided by a common carrier for passenger service, and is expressly limited to persons on such a conveyance. If the wording had gone only so far as to say that "while a passenger", there would be more strength to the contention of the petitioner that the meaning was not restricted to passengers on a public conveyance operated by a common carrier for the purpose of carrying passengers. The wording does not stop there. It explicitly states that the character of "passenger" which the double indemnity provisions cover to be one who is such with relation to the common carrier and therefore the source to which to look to determine whether that relationship has accrued is to the law of carriers. It was to that law that the Circuit Court of Appeals looked. That the Circuit Court of Appeals was correct is recognized by many cases, among them the one cited by the petitioner here at page 12 of its brief, namely, *Berliner v. Travelers Ins. Co.*, 121 Cal. 458. The Circuit Court of Appeals quotes from that case, the language quoted being:

> "These were cases that involved the liability of the railroad company for injury to its passengers while rightfully upon the engine, and were not cases of accident insurance; but the word 'passenger' as here used is evidently intended to designate the character or relation the insured

> sustained to the proprietor of the conveyance, and are therefore in point."

The Circuit Court of Appeals further quotes from the case of *Quinn v. New York Life Ins. Co.*, 195 N. W. 427, 428, in which the Supreme Court of Michigan states:

> "It is further contended that, as between plaintiff and the defendant, a different rule should be applied than between the plaintiff and the street car company on the question whether the insured was a passenger at the moment he was struck.
>
> Considering the last question, we are unable to see why any distinction should be made between the insurance company as a defendant and the street car company. At the time the provision, 'while traveling as a passenger on a street car', etc., was adopted by defendant and made part of its contract, that phrase had well-understood meaning in the law, and it is reasonable to suppose that the meaning given to it by the courts was well understood and considered by defendant before making it a part of its double liability, and it was well known by both parties when the contract was made that, should the parties afterwards disagree upon the question of liability, the courts would probably give the language the same construction they had given it in cases where transportation companies were defendants. We cannot agree with defendant in this suggestion."

In fact, no case has been cited where the question has been squarely presented to the court deciding it, in which it has been held that the word "passenger" as used in an insurance policy is not to be given the same

meaning that it is given in the law of carriers where a railroad company is the defendant.

The insurance company here agrees to pay a doubly indemnity for a single premium. The only reasonable ground on which it could do this is that the hazard or risk for which it pays the double indemnity is reduced proportionately. This risk is so reduced, when one acquires the status of a passenger upon a common carrier, because of the innumerable safeguards with which the carrier surrounds its passenger. The risk of accident is not only not reduced below the ordinary (and it is for accident sustained from the usual or ordinary risk that the single indemnity is paid) when one is in the act of boarding a moving train, it is increased many fold. It is common knowledge that in boarding a moving train the hazard is great and the accident ratio exceedingly high, and yet the petitioner asks that this policy be so construed that for a risk greater than the ordinary risk and for which only the single indemnity is payable, the double indemnity should be paid. As the Circuit Court of Appeals points out, not only is the rule of law in favor of the respondents here, upon the meaning to be given to the word passenger, but the reason for the meaning, as appearing from the argument just preceding, is equally strong in its favor.

There is no doubt whatever that were a railroad company the defendant here, any court to which the facts might be presented would hold as a matter of law that the deceased had not become a passenger at the time that he slipped from the steps. The authorities are practically unanimous to that effect. The fact

that an insurance company is the defendant should not and does not alter the rule. Insurance companies do not carry passengers. There is no such thing as a passenger with relation to an insurance company. That relation is determined only as between the assured and the carrier. Here, as the Circuit Court of Appeals points out, the status of passenger did not attach to the decedent because he did not gain a place of safety and did not leave the hazard inherent in the act of boarding a moving train, behind him.

There is one point in the petitioner's brief, at page 6, where there appears to be some confusion between the question of when one has become a passenger and the question of when a passenger is guilty of contributory negligence. The question of contributory negligence has never been involved in the case at bar. The United States Fidelity and Guaranty Company has always conceded that the question was not involved and was not a defense under the policy, and those carrier cases in which the question of contributory negligence was involved were accordingly eliminated from consideration. In an action against a common carrier by one claiming to be a passenger, there are always two questions to be answered; first, has the person become a passenger so as to be entitled to all the protective measures afforded passengers, and second, if so, has he been guilty of contributory negligence in connection with his injury. In each of the cases selected by the respondent here and cited to the Circuit Court of Appeals as bearing upon the meaning of the word "passenger", the court did not find it necessary to pass upon the question of

contributory negligence of the injured person, because it found at the threshold of the inquiry that he had not become a passenger.

The rule announced in the cases (and the authority is overwhelming, in favor of the rule) that one who makes an attempt to board a railroad train after it has commenced to move does not become a passenger until he reaches a place of safety thereon, and the hazard attendant upon the attempt be left behind him. If in the course of the attempt he slips, is pushed off, brushed off, knocked off, or falls off, he has not acquired the status of passenger. The cases lay no emphasis on the manner of his getting off, holding simply that if in making the attempt he is hurt or killed, he is not a passenger. The cases cited by the respondent, United States Fidelity & Guaranty Company, are cases in which, because of the unsuccessful attempt, it was held as a matter of law that the person making the attempt had not become passengers. The only authority found to the contrary, and that one is cited by the petitioner, and chiefly relied upon by it, is the case of *Fidelity and Casualty Company v. Morrison*, 129 Ill. App. 360. This case stands alone. It has never been cited as authority in any other court, so far as we can discover; it has never been considered by the Supreme Court of Illinois, and is so wholly at variance with the overwhelming weight of authority upon the question that it is entitled to no weight. The opinion of the Circuit Court of Appeals and this brief contain the authorities relating to the question and it is unnecessary to recite them, as they are fully discussed there.

Policies of accident insurance often differ in wording. Some of them cover the assured while travelling upon a common carrier or riding upon a railroad train. Some of them expressly exclude from the coverage a *passenger* if he is on the platform, running board, or steps of the train, and some of them, as does the policy here, extend the protection of the double indemnity provision to a *passenger*, and in order to remove any ambiguity, expressly extend it to him while on the running board, platform or steps of the conveyance. He must, however, be a passenger in order to come within its terms. As the Circuit Court of Appeals points out in the following language:

> "The appellee insists that full force should be given to the words 'platform, steps, or running board'. In this contention, the appellee is quite correct. But equal force should be given to the words 'while a passenger'. If the appellee has not brought herself within *all* the conditions precedent to recovery under the policy, she cannot be awarded double indemnity."

What the petitioner here in reality asks is not that the definition of the word "passenger" be extended, but that the word "passenger" be dropped out of the language of the policy altogether, and that in legal effect the clause be left to read:

> "(1) While in or on a public conveyance (including the platform, steps, or running board thereof) provided by a common carrier for passenger service."

As the Circuit Court of Appeals points out, quoting from the case of *Ripley v. Insurance Co.*, 83 U. S. 336, 338:

> "The contract must receive the construction which the language used fairly warrants. What was the understanding of the parties, or, rather, what understanding must naturally have been derived from the language used?"

The petitioner in her brief, at pages 7, 8 and 9, attempts to show that the reason upon which the Circuit Court bases its opinion is not applicable to the case at bar, by pointing out that the authorities selected by the petitioner to make the point (though they are by no means all the cases cited in that court) are discussing persons inside the car. There are two answers to this argument. The first is, that what is ascribed by the petitioner as the reason expressed by the Circuit Court for its opinion as to what the word "passenger" means, is only one of the reasons of the court for reaching its conclusion, and we should say, not the principal reason. The principal reason upon which the Circuit Court relies is, that within the meaning of the word "passenger", as used in the contract, the assured never became a passenger and, therefore, regardless of all other considerations, was not within the double indemnity provision of the policy. A secondary reason assigned, is that to which the petitioner alludes, namely, that the reason for the rule is in favor of the insurance company in the case, as well as is the rule itself, in that the risk while one is a passenger is greatly less than while one is attempting to board a moving train and has not become such. It happens, incidentally, that in the particular cases which the petitioner selects to make its point of those cited by the Circuit Court of Ap-

peals, the example discussed is that of one who is within a car or seated inside a car. The error of the argument, however, lies in the refusal of the petitioner to extend the rule discussed by the court to its proper limits. The degree of care owed to a passenger by a carrier, regardless of where he is, so long as he is a passenger, is a very high one. The degree of care owed to one attempting to board a moving train is practically none at all, except to refrain from a wilful injury. The hazard is indeed great to one making such an attempt, and far greater than to one who has become a passenger on a train, even though having become such he be on the platform, or on the steps, or on the running board. He has left, when he becomes a passenger, the hazard of the act of boarding behind him. He has gained a condition of safety and security which he never had while in the act of boarding. The fact that one occupies a safe position while inside the car, as announced in the authorities mentioned by the petitioner in its argument, derogates not at all from the proposition that one who has acquired the status of passenger on the train, regardless of whether he is on the steps or on the running board, or on the platform, or inside the coach, is in a far safer position than one who has not acquired such status, for one very compelling reason alone, namely, that the carrier thereupon owes him the very highest degree of care and will demean itself accordingly.

The ultimate and significant fact is that one a passenger has innumerable safeguards about him for his protection, and that one a bare licensee or a

trespasser has none at all, and this very element, even though the two persons who might be under consideration occupy the very same physical position upon the train, makes the hazard to the licensee or trespasser very great indeed, and the hazard to the passenger very slight indeed. This is the basis upon which the Circuit Court of Appeals places its secondary reason, which has been criticized by the petitioner.

The fact that one who is seated inside a passenger coach may occupy a very safe position and, therefore, be subject to slight risk, is no argument whatever to support the proposition that one a passenger upon the platform, running board or steps of a passenger train is not far safer than one occupying the same position when not a passenger. The petitioner says at page 7 of her brief:

> "To limit the word 'passenger' as used in the policy to 'a place of safety inside the car' or to one who has '*seated himself inside the car*', as defined by White and in the Merrill case, quoted above, is to annul the language of the policy 'in or on a public conveyance (including the platform, steps, or running board thereof)'."

The Circuit Court of Appeals definitely does not limit the use of the word "passenger" in the policy to a place of safety inside the car or to one who has seated himself inside the car. To do so would of course do violence to the terms of the policy because the policy contemplates that under certain circumstances a person may be a passenger while on the steps, platform, or running board of a train, and

one is always such in the course of either boarding or alighting from a train while on the running board, platform, or steps thereof, if the train be stopped at the proper point for taking on or discharging passengers. One attempting to board a train stopped at the station for that purpose is treated as a passenger in many instances, even before he gains contact with it, and is certainly a passenger when he is attempting to board it, and if the train starts without warning and he is injured in the course of the transaction his rights are those of a passenger. If the train here had been stopped and the decedent had been making his attempt to board it while it was stationary and had got no further on to the train than he did; and the train had started suddenly without giving him fair warning or opportunity to protect himself, his rights undoubtedly would have been those of a passenger.

II.

WITH REFERENCE TO ASSIGNMENT OF ERROR NO. 2, NAMELY, THAT THE VERDICT OF THE JURY WAS NOT SUSTAINED BY THE EVIDENCE.

As the argument addressed to this assignment is disposed of by the argument addressed to the first and third assignments of error it need not be repeated here, and we say only in this connection that the verdict of the jury is not sustained by the evidence because the evidence shows conclusively that the decedent was not a passenger at the time of his injury.

III.

WITH REFERENCE TO ASSIGNMENT OF ERROR NO. 3, -NAMELY, THAT THE COURT ERRED IN REFUSING TO GIVE TO THE JURY INSTRUCTIONS REQUESTED BY THE DEFENDANT AND APPELLANT NUMBERED 2, 4, 5, 6, 7 AND 8.

The instructions given by the court appear at pages 36, 37, 38, 39, 40 and 41 of the record. The instructions requested by the defendant and refused by the court appear at pages 42, 43 and 45 of the record, and present to the jury the question whether Walter John Aschenbrenner, the assured, had reached a place of safety and left the hazard of boarding behind him, and the jury in substance are asked to be instructed that if he did not accomplish this he was not a passenger.

Instruction No. 5 particularly sets forth the theory of the respondent, United States Fidelity & Guaranty Company. Nowhere else in the instructions is this question or theory presented to the jury. The only instruction given by the court purporting to touch upon the rules applicable to the conduct of the decedent in attempting to board a moving train was one appearing in the record commencing at the bottom of page 39 and concluding at the bottom of page 40. An examination of that instruction will show that nowhere embraced within it are the questions of the assured's reaching a place of safety or the carrier's withdrawing the invitation to board a moving train, or any of the vital rules embodied in the instructions requested by the defendant and supported by the authorities cited. This instruction of the court virtually amounted to a directed verdict for the plaintiff.

We ask that assignments II and III be considered only in the event that this court should hold the ruling of the Circuit Court of Appeals on the first assignment to be erroneous upon the merits.

To advert now to the authorities cited by the petitioner. The first of these is at page 11 of her brief—*London Guaranty & Accident Co. Ltd. v. Ladd,* 299 Fed. 562, 564. There are two companion cases, termed for brevity the *Ladd* cases. In the first case, the *London Guaranty & Accident Co. v. Ladd* case, the covering provision of the policy was as follows:

> "If such injuries are sustained while riding as a passenger in a car intended for the use of passengers and being in or upon any passenger car, or in a passenger elevator."

The injury to the insured which resulted in his death came from falling down an elevator shaft in an apartment house. The elevator was automatic and designed so that it could not be started unless all the doors were closed. There was no eye witness to the accident. The insured was found in the bottom of the shaft in the basement. The carriage was found standing at the second floor, and the door of the shaft on the first floor found to be open. The court draws the inference that the assured must have walked through the door on the first floor into the elevator shaft. The District Court Judge directed a verdict for the plaintiff in each of the *Ladd* cases for the double indemnity. With reference to the provision of the policy just quoted, the Circuit Court of Appeals says:

> "The important words are 'while riding as a passenger', * * * in a passenger elevator."

and held that the words "while riding" meant actually riding in the car, and that as he had not been riding in the car the judgment for the double indemnity on this policy was reversed.

The insuring words of the second policy in the *Preferred Accident Company v. Ladd* case were "while a passenger and is within a passenger elevator." The court points out the distinction between the word "within" and the words "while riding in" and holds that under the second policy the area covered may fairly refer to the area within the shaft, and not necessarily confined to the car or carriage, and the double indemnity was allowed to stand as to the policy involved in the second case.

In the case of *Preferred Accident Ins. Co. v. Muir*, 126 Fed. 926, cited at page 11 of petitioner's brief, the situation in substance was as follows: The double indemnity insuring provision was "if such injuries shall be received by the insured while riding as a passenger in or on a public conveyance provided by a carrier of passengers for compensation"; and another provision of the policy excepted from the coverage "injuries resulting from attempting to leave the conveyance." The decedent was admittedly a passenger, he having taken his place in the train, and as the train proceeded on he became car sick. His companion suggested that he open the window to vomit; he declined to do this and walked to the front of the car and tried the closet door and found it locked. He then opened the door on to the car platform and when last seen was apparently stooping over in the act of vomiting. He fell from the plat-

form and was killed. The car was travelling at a rate of speed between fifty and sixty miles an hour. As the court says, referring to the insuring provision above:

> "Muir's case is within the very terms of the stipulation."

Obviously he was a passenger and did not lose that attribute by going to the platform after trying the closet door for the purpose of vomiting.

If the deceased in the case at bar had ever got safely upon the train and acquired the status of a passenger and then had come to the platform for any purpose and fallen off, a very different question would have been presented.

In the case of *Berliner v. Travelers Ins. Co.*, 121 Cal. 458, cited at page 12 of petitioner's brief, the policy provided double indemnity under provision "f", as follows:

> "If such injuries are sustained while riding as a passenger in any passenger conveyance using steam or electricity, etc."

The deceased assured was riding on a train in Mexico at the request of the superintendent, and then upon the further request of the superintendent rode upon the engine to better see the surroundings. It was held by the court that the assured did not lose his capacity or status of passenger by going upon the locomotive at the request of the authorities of the road. It then uses language highly important in the case at bar, and that language is as follows:

"If Mr. Berliner had been riding on the train in any other capacity than that of a passenger, that is, as an employee of the railroad company, or an express or mail agent, or a tramp stealing a ride upon a brake beam; the defendant would not be liable under clause 'f'. But he occupied no such relation to the railroad company or the train. Though upon the engine, he was a passenger. That he did not lose his character as a passenger by going upon the engine at the request of an officer of the road, see Lake Shore etc. R. R. Co. v. Brown, 123 Ill. 186; 5 Am. St. Rep. 510; McGee v. Missouri Pac. Ry. Co., 92 Mo. 208; 1 Am. St. Rep. 706; Nashville etc. R. R. Co. v. Irwin, 3 Am. & Eng. R. R. Cas. 465. These were cases that involved the liability of the railroad company for injury to its passengers while rightfully upon the engine, and were not cases of accident insurance; but the word 'passenger' as here used is evidently intended to designate the character or relation the insured sustained to the proprietor of the conveyance, and are therefore in point."

The cases cited in the opinion of the Circuit Court of Appeals clearly establish the principles

(1) That there must be a contract between a carrier and the person claiming to be a passenger in order to constitute the relationship of carrier and passenger.

(2) This contract may be express or implied.

(3) That when the conveyance stops at the regularly appointed place to take on persons desiring to board it and starts without warning while one other-

wise entitled to become a passenger is attempting to board it, his rights are those of a passenger.

(4) That as soon as the conveyance commences to move the implied invitation theretofore extended by the carrier, to persons to board the train is withdrawn, and one who attempts to board the train after it has commenced to move does not acquire the status of passenger thereon until he has reached a place of safety and left the hazard of the attempt behind him. If in the course of the attempt he is injured or killed, as a matter of law he is not a passenger.

To supplement those authorities we cite

Boyd v. Royal Indemnity Co., 166 N. E. 580;
Fay v. Aetna Life Ins. Co., 187 S. W. 861;
Speaks v. Metropolitan R. R. Co., 166 S. W. 864.

In the *Fay v. Aetna Life Ins. Co.* case, supra, the wording of the provision of the policy was almost identical with the wording of the policy here. It is as follows:

> "if such injuries are sustained by means as aforesaid while the assured is a passenger in or on a public conveyance provided by a common carrier for passenger service (including platform, steps or running board of railway or street railway cars) * * * the amount to be paid under Sections 1, 5 and 6 should be double the sum otherwise payable for such injuries."

There was a verdict and judgment for the plaintiff for the double indemnity and the defendant appealed. The evidence for the plaintiff tended to show in sub-

stance that while the elevated train was standing at the appointed place for taking on passengers the deceased attempted to enter the car. While he was on the step or partially on the step with the car standing still, the conductor closed the door which had been standing open, and the car went forward with the decedent hanging to the handholds with a foot on the step. He was thrown to the street below by a structure at the side of the tracks. The evidence for the defendant tended to show in substance that the plaintiff ran and tried to board a moving car after the door, through which passengers were admitted, had been closed. This obviously creates a sharp conflict in the evidence and the jury's verdict could not be disturbed. Apropos of the situation existing here, however, the court says:

> "The evidence for the plaintiff made him a passenger, whilst that for the defendant did not."

thus recognizing the rule announced in the other authorities.

In the case of *Speaks v. Metropolitan R. R. Co.*, supra, the decedent came on to the platform to board the car, ran for the car and got upon the step of the rear vestibule while the car was in motion. Shortly thereafter he was struck by a guard rail at the end of the platform and fell thirty feet to the ground and was killed. The trial court sustained a demurrer to the evidence and the court of appeals affirmed, holding among other things that the plaintiff was not a passenger, using the following language:

> "The mere fact that deceased ran or went toward and jumped or stepped on the moving

> car did not create the relation of carrier and passenger. 1 Nellis on Street Railways (2d Ed.) Secs. 249, 258. There was no evidence anywhere that there was any act indicating an acceptance of deceased as a passenger.'"

In the case of *Southern Pacific Co. v. Poole*, 160 U. S. 438, in speaking of the question of negligence, which is not involved in this case but the language is pertinent, the court says:

> "There is also no doubt, where the facts are undisputed or clearly preponderant, that the question of negligence is one of law."

And similarly here, where the facts are without dispute, the question whether the deceased did or did not become a passenger is a pure question of law.

The case of *Wood v. General Acc. Co.*, 156 Fed. 982, cited at page 13 of petitioner's brief, if it be any authority whatever pertinent to the question here, is authority for the position of the respondent. The court holds that a railway mail clerk is not a passenger and says further that the word "passenger" shall be given its ordinary meaning, which under the facts of that case could not possibly be other than the meaning ordinarily attached to the term when fixing the relation between a carrier and a person carrier. It is precisely that meaning which the respondent here attaches to the expression and which the Circuit Court of Appeals attached to it.

What is the plain, ordinary use of the term "passenger" with reference to carriers? It is obviously nothing more nor less than the decisions in-

volving persons and agencies who carry them determine it to be.

The case of *Aetna Life Ins. Co. v. Davis*, 191 Fed. 343, is also cited by the petitioner involved a passenger elevator and a death upon it. An examination of that case discloses that the questions there were clearly questions of fact for the jury. The elevator involved was operated by a specially selected operator from an early hour in the morning until 6:30 P. M. when it was ordinarily shut down and the operator went home. There was evidence, which was disputed, that the decedent had a special arrangement with the vice-president and general manager of the company owning the building to the effect that, twice a month when he desired to assemble certain persons in his office after the usual closing time of the elevator service, he might use this elevator and one of the janitors would act as operator. The night of the accident was one of these occasions. About 7:30 P. M. on the evening of the accident one Avery, a janitor, was operating the elevator. The decedent, Cobb, was seen to stop at the door of the elevator shaft on the fourth floor of the building. Soon after he was heard to cry out: "Oh, my God, he has crushed my foot." The janitor operating the elevator moved the elevator upward and Cobb fell into the shaft and was found dead. From the testimony of the janitor it seemed that the decedent did not actually get into the elevator, but from the physical facts it seemed that the decedent had got well into the elevator before it started. The court held under this conflict the question to be one for the jury

as to whether the decedent had become a passenger, and says:

> "If Avery's (the janitor) testimony be true, he had only offered himself as a passenger and had not in any respect entered the elevator."

The fundamental point of distinction between that case and the case at bar is that the elevator had actually stopped at the floor for the purpose of permitting the decedent to enter. If the elevator had been in motion passing an open elevator door, and Cobb had run for it in an attempt to jump into it while in motion a similar situation would have existed there as exists in the case at bar. Under such circumstances it was held that inasmuch as a jury had resolved the question upon a conflict in the evidence that the decedent was within the provisions of a policy affording double indemnity to the assured "while a passenger in an elevator provided for passenger service". No fault that we know of can be found with the ruling.

This case cites and discusses the case of *Aetna Life Ins. Co. v. Vandecar*, 86 Fed. 282 (8th Circ.), and that case has an especial bearing upon the question here. In that case an accident policy provided for double indemnity to the assured "if such injuries are sustained while riding as a passenger in any passenger conveyance using steam, cable or electricify as a motive power the amount to be paid shall be double the sum above specified". The assured was a passenger upon a steam train. When it approached the station at which he was to alight he went on to the platform waiting for it to stop. While standing there there was a sudden lurch of the train, he was thrown to

the track, and his right hand severed above the wrist. The trial court instructed the jury as follows:

> "The court instructs you as a matter of law that a person riding upon the platform of the passenger car, as was the plaintiff, is within the provision of the policy in question which provides that if the injuries are sustained while riding as a passenger in a passenger conveyance using steam as a motive power the amount to be paid shall be double the amount specified."

The Circuit Court of Appeals reversed the judgment, holding that this instruction was error, and that the term "in a passenger conveyance" meant a position inside the car and did not extend to the platform, refusing to extend the expression "in any passenger conveyance" to include the platform.

By the same reasoning the Circuit Court of Appeals in the case at bar refused to extend the expression "while a passenger" to include one who as a matter of law was not a passenger.

The case of *Imperial Fire Ins. Co. v. County of Coos*, 151 U. S. 452, cited by petitioner, has no direct bearing upon the controversy here. A fire insurance policy provided if "mechanics are employed in building altering, or repairing the premises named herein" without notice to or permission of the fire insurance company, its violation by the assured in permitting artisans and mechanics to come on the premises and work for a number of weeks in making repairs exonerated the company and a judgment for the plaintiff was reversed. The court uses language, however, which is important, quoting:

"If the insured cannot bring himself with the conditions of the policy he is not entitled recover for the loss."

And again:

"The compliance of the assured with the ter of the contract is a condition precedent to t right of recovery."

The court then goes on to say that when there is a ambiguity or a term used can be fairly susceptible two different constructions, that adverse to the i surance company will be adopted. It then says:

"But the rule is equally well settled that co tracts of insurance like other contracts are to construed according to the sense and meaning the terms which the parties have used, and they are clear and unambiguous their terms a to be taken and understood in their plain, ord nary and proper sense."

That is all that we contend for in the case at bar.

The case of *Mitchell v. Marker*, 62 Fed. 139, cit by respondent, has no bearing on the controversy he the court simply holding that a carrier of passenge in an elevator is subject to the same requirements the carrier of passengers on a railroad as to t degree of care extended to the persons carried.

THE DIRECTION OF THE CIRCUIT COURT OF APPEALS IS NOT IN VIOLATION OF THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

This question is elaborately reviewed in the case of *Slocum v. New York Life Ins. Co.*, 228 U. S. 364. Mr. Justice Van Devanter wrote the opinion in chief, concurred in by four justices; and Mr. Justice Hughes wrote the dissenting opinion, concurred in by three justices. The force of the reasoning in the dissenting opinion in that case seems to us to be conclusive and the passage of years and the accumulation of litigation seem to have given it greater strength now than it had when first pronounced. In the case here the evidence which is without dispute supports only one possible conclusion, namely, that the assured was not a passenger at the time of his injury. The discussion of the constitutional question obviously presupposes that the ruling of the Circuit Court of Appeals upon the merits of the case is correct.

Now, if this conclusion be sound, then concededly upon the authority of the majority opinion in the *Slocum* case, the trial court, in response to the defendant's motion, should have directed a verdict in favor of the defendant United States Fidelity and Guaranty Company on the double indemnity feature of the case. Authority for this appears both in the opinion in chief and in the dissenting opinion in the *Slocum* case. The power of the Federal trial courts to direct verdicts is universally held not to encroach upon the Seventh Amendment to the Federal Constitution. It has been held not to do so because it con-

stitutes no invasion of the province of the jury for the trial court to decide questions of law.

Where the material facts are without conflict and support only one inference, or only one set of inferences, there is no question of fact to be decided and the question then becomes one purely of law. The trial court directs the jury to render its verdict a certain way, and if the verdict be not so rendered the power of the court to set it aside is unquestioned. How can it be said under such circumstances that there has in reality been a trial by jury in the trial court? True, a jury was present to try the issues of fact, if any had been presented, but when there is nothing for the jury to try, as is the case when only questions of law are presented, the jury tries nothing. It acts in effect, under such circumstances, as a pure automaton, subject to the direction of the trial judge.

If the trial judge has this power, and admittedly he has, why does not the same power vest in the appellate court? It is universally recognized that an appellate court is equally as well authorized and equipped to decide questions of law as is the trial court. What the trial judge does in directing a verdict is to try a question of law and to decide a question of law, and what the appellate court does in reviewing the action of the trial judge under such circumstances is to try a question of law and decide a question of law. To say that the trial judge has the power to determine a question of law, which is all that he does when he directs a verdict, and that this does not invade the province of the jury within the meaning of the Sev-

enth Amendment; and to say in the next breath that the appellate court is without such power is a paradox which is not understandable. The Seventh Amendment expressly reserves the right of a jury trial to a litigant where questions of fact are to be tried. It neither attempts to nor does it confer upon the jury the privilege of trying questions of law. This has always been, under the English system, the Federal system, and under the state systems, with one or two minor exceptions, such as in the law of criminal libel, which are not involved here, the function of the court.

When the trial court directs a verdict against a party he has been denied a jury trial, not in violation of any right of his, but simply because there was nothing for the jury to try. He has been denied the trial, but he has been denied no right, because nothing has been presented that gives him the right to have his cause passed upon by a jury, assuming, of course, that the trial court's direction was proper. When the jury brings in a directed verdict it has tried nothing and has in reality done nothing save act as the mouthpiece of the court. When the trial court directs a verdict in so doing it is not trying the facts. All the facts are construed against the party in whose favor the verdict is directed. The process through which the court goes under such circumstances is the determination purely of a question of law. This function, namely, the determination of questions of law is not peculiar to the trial court. It is the function of courts from the lowest to the highest, and if the trial court has such authority and is trying only a question of law when it directs a verdict, why does not the

appellate court have the same authority to direct
verdict that the trial court in the first instance sho
have directed?

The effect of the decision in the *Slocum* case is t
the trial judge has power to direct the jury upo
pure question of law, but that the appellate co
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The opinion in chief in the *Slocum* case concedes t
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the only question before that court was one of l
and that court was competent to pass upon the qu
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same facts, be denied a similar right? If the acti
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ing to direct a verdict is one purely of law, how d
the function cease to become such when it is tra
ferred to the appellate court? The reasoning by wh
a contrary conclusion is arrived at is difficult to follo

The direction of a verdict and consequent jud
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appellate court denies a jury trial because there

nothing to try its action is held to be a violation of the constitutional amendment. It is extremely difficult to find any basis in reason for the distinction.

In the *Slocum* case the opinion in chief mentions that if the case be sent back for a new trial the plaintiff under such circumstances might be able to strengthen his case by producing additional facts. This clearly affords to the litigant an indulgence which he is not entitled to have. If the trial court had directed the verdict in the first instance, as it should have done, upon an appeal from that judgment the action of the trial court would have been affirmed, the litigation at an end, and the plaintiff afforded no opportunity to retry his case. The mere fact that the trial court has erred should give the plaintiff no greater advantage than he would have had had the trial court properly performed its duties. The litigant should not be permitted to make capital of the error of the trial court, nor should the possibility of several trials of his action be held out to him because of this error.

The point decided in the *Slocum* case, namely that the Circuit Court of Appeals cannot reverse a judgment based upon the verdict of a jury with directions to enter a contrary judgment, has been squarely presented to the Supreme Court only once since, as far as we can ascertain from a careful examination of the decisions. It was thus presented in the case of *Forged Steel Wheel Co. v. Lewellyn*, 251 U. S. 511. In that case the petitioner sued one Lewellyn, Collector of Internal Revenue, to recover the sum of $246,920.18 exacted from the petitioner as a tax under the Muni-

tions Tax Act and paid under protest. A jury trial was had and a verdict was returned in favor of the petitioner for the amount prayed. The Circuit Court of Appeals reversed the judgment but did not remand the case for a new trial. This court disposes of the contention that the case should have been remanded for a new trial in the following language:

> "Objection is made to the action of the Circuit Court of Appeals in simply reversing the judgment of the District Court, and not remanding the case for a new trial. There was no objection made to that action, and no request for a remand of the case; and, besides, there was nothing to retry. The case involves only propositions of law."

It is our position that the closing language of this quotation, namely, "and besides, there was nothing to retry. The case involved only propositions of law", is opposed to the ruling of the majority opinion in the *Slocum* case. While the consideration of the point is not elaborate, the facts involved, plus this statement, mean simply that the court has held that in a jury trial, where there is nothing but a question of law before the Circuit Court of Appeals, it is not necessary for it to remand a case for a new trial. The *Forged Wheel* case, being later in date, has in effect overruled the *Slocum* case. To be sure in the *Forged Wheel* case the Circuit Court of Appeals did not direct a judgment to be entered contrary to that rendered upon the verdict. The effect of the reversal, however, was the same as though it had given such a direction, because it decided as a question of law that the party who had won before the jury in the

trial court was not entitled to win, and reversed the judgment with no opportunity afforded to him to retry his case. The result reached in both cases was the same. The action of the Appellate Court in the *Slocum* case was overturned, while in the *Forged Wheel* case it was upheld.

The petitioner cites in addition to the *Slocum* case the case of *Fidelity Title & Trust Co. v. Dubois Elec. Co.*, 253 U. S. 212, as supporting its position on this point. The latter cites the *Slocum* case with approval, but the facts of the *Fidelity Title & Trust Co.* case indicate that the point originally decided in the *Slocum* case was not involved in the decision of the *Fidelity* case. In the latter case one Pancoast sued for personal injuries. The Circuit Court of Appeals set the verdict aside and ordered a new trial. A new trial was had, the plaintiff had judgment, and the Circuit Court again set aside the verdict and judgment, but this time without remanding the case for a new trial. This court, in deciding the case, says:

> "Of course, if the judgment of the Circuit Court of Appeals was right on the merits a new trial should have been ordered."

It went on, however, to review the action of the Circuit Court of Appeals, found that its decision was wrong, reversed that court upon the merits, and affirmed the judgment of the District Court for the plaintiff. Inasmuch as the real point decided in this case is that the judgment of the Circuit Court of Appeals was erroneous upon the merits, the language above quoted is dictum.

There have been various forms or procedural steps for presenting to the trial court the question whether the evidence of the plaintiff most strongly considered in his favor makes out a case for him, or whether the evidence of the defendant most strongly considered in his favor makes out a defense for him. While the forms have differed the substance and effect of the effort have always been the same, namely, to present to the trial court a question of law to be decided. Whether it be as it earlier was, by demurrer to the evidence, or whether by motion for a nonsuit or for a directed verdict, the question to be determined by the trial court was and is always one of law. We quote the language of Mr. Justice Hughes, dissenting in the *Slocum* case:

> "The serious and far-reaching consequences of this decision are manifest. Not only does it overturn the established practice of the Federal courts in Pennsylvania in applying, under the conformity act, the provisions of the state law, but it erects an impassable barrier—unless the Constitution be amended—to action by Congress along the same line for the purpose of remedying the mischief of repeated trials, and of thus diminishing in a highly important degree the delays and expense of litigation. It cannot be gainsaid that such a conclusion is not to be reached unless the constitutional provision compels it. I cannot see that it does compel it. On the contrary, I submit, with the utmost respect, that the Pennsylvania practice adopted by the circuit court of appeals is entirely in conformity with the 7th Amendment."

The mischief of repeated trials, to which allusion is made in this quotation, is greatly intensified under existing conditions. Litigation is multiplied, courts have become congested, litigants are being compelled to wait and to suffer onerous burdens in the way of expenses of litigation and delay, as never before.

It is conclusive, as the record now stands, that both the plaintiff and the defendant in the trial court have made their cases fully. The question has become one purely of law which the trial court should have so held, but which, because it did not do so, a retrial must be had and a new opportunity given to the trial court to so hold; when the Circuit Court of Appeals, clothed with equal, if not greater power upon questions of law, is entirely competent itself to decide the point.

Under the theory of the *Slocum* case where is litigation logically to terminate? Suppose that the case at bar should go back for a new trial and the evidence show without dispute the effort of the decedent assured to board a train in motion when he made the attempt, and, therefore, as a matter of law he had not become a passenger upon it. If the Circuit Court of Appeals is without the power at the present time to direct a judgment upon the double indemnity feature simply because a jury happens to have been present, and if the trial court should be of the opinion that the Circuit Court of Appeals was wrong it could again submit the case to the jury to have determined whether the deceased was a passenger at the time of the accident, and if the jury should

find the deceased to be a passenger, the case would be appealed again to the Circuit Court of Appeals, a reversal would result, and so an endless chain of litigation be commenced which would eventually bankrupt one or the other of the litigants.

It is no answer to this statement to say that the trial court might not do this. The test is not of possibilities but of power. If it has the power to do it, and the Circuit Court of Appeals is without power to prevent it from doing this, it will have to be assumed that it will do it. The vice of the principle lies in the confessed impotence of an appellate court, where only questions of law are involved, to control the action of the subordinate court.

The state of the law of California with respect to the situation when the Circuit Court of Appeals pronounced its judgment was as follows: In 1923 the Legislature of California adopted Section 629 of the Code of Civil Procedure. That section is as follows:

> "Judgment notwithstanding verdict. When a motion for a directed verdict, which should have been granted, has been denied and a verdict rendered against the moving party, the court, at any time before the entry of judgment, either of its own motion or on motion of the aggrieved party, shall render judgment in favor of the aggrieved party notwithstanding the verdict.
>
> A motion for judgment notwithstanding such verdict may also be made in the alternative form, asking therefor and reserving, if that be denied, the right to apply for a new trial. If the motion for a directed verdict or for judgment notwithstanding the verdict be denied, the trial court on

motion for new trial or the appellate court on appeal from the judgment may order judgment to be so entered when it appears from the whole evidence that a verdict should have been so directed at the trial; and when the motion is made in the alternative form, the court may also so order on appeal from the order denying such motion for judgment notwithstanding the verdict, whether a new trial was granted or denied."

From this it is clear that the Appellate Court may order judgment notwithstanding the verdict to be entered when it appears from the whole evidence that a verdict should have been so directed at the trial. The Supreme Court of California construed this section in *Bolar v. Maxwell Hdw. Co.*, 205 Cal. 396. The action there was for negligence and there was a motion for a directed verdict by the defendant, which motion was denied. No motion, however, was made for a judgment notwithstanding the verdict, but the Supreme Court, in the absence of such a motion, construed the section to confer upon it authority to reverse and direct the trial court to enter judgment for the defendant because it found that the motion for a directed verdict should have been granted.

It has been held in California that trial by jury is a matter of right on proceedings for partial distribution in the estate of a decedent.

Estate of Baird, 173 Cal. 617.

In such a proceeding, even before the adoption of Section 629 of the Code of Civil Procedure, the Supreme Court of the state reversed a judgment of the trial court based upon a general and upon special

verdicts of the jury in favor of one petitioning for partial distribution claiming to be an adopted son. The Supreme Court made the following order:

> "It is ordered, adjudged and decreed by the Court that the decree of Partial Distribution of the Superior Court in and for the City and County of San Francisco in the above entitled cause be and the same is hereby reversed and the trial court is ordered and directed to set aside the special verdicts and findings and to enter judgment for appellants denying the petition for partial distribution upon the ground that respondent is not the adopted son or heir of the deceased."
>
> *Estate of Baird*, 182 Cal. 338.

It is clear from this section and these decisions that the practice in California at the time that the Circuit Court of Appeals in the case at bar rendered its decision, clearly conferred upon the state appellate courts the power to make such an order as did the Circuit Court of Appeals make here. The Circuit Court of Appeals then was doing no more than following the California procedure, which, unless its action did violence to the 7th Amendment to the Federal Constitution, it was clearly entitled to do.

Conformity Act, Revised Statutes, Sec. 914.

We appreciate that the 7th Amendment to the Federal Constitution has been held to be binding only upon the Federal Courts. For that reason decisions respecting the power of the state courts are not strictly in point. However, we believe the question involved to be so closely related in its fundamentals to similar questions involving the power of state courts, that we have cited some of the principal authorities which hold that state courts in a situation similar to the one existing here have the constitutional right to direct the trial court, even after judgment upon a verdict, to enter a contrary judgment where the question involved is only one of law; and some of the cases go even further and confer the power where the question is as to the weight of the evidence.

Gunn v. Union Railway Co. (R. I.), 62 Atl. 118;

Central R. R. & Banking Co. v. Kent (Ga.), 18 S. E. 850;

Musser v. Harwood, 23 Mo. App. 495;

Brownsville v. Basse (Texas), 43 Tex. 440;

Borg v. Chicago, R. I. & P. Ry. Co. (Ill.), 44 N. E. 722.

In *Borg v. Chicago, etc.*, supra, the court says:

> "But when with all the advantages accorded to them it appears to the appellate court that there cannot be a recovery which should be allowed to stand, no constitutional right is invaded by a refusal to remand the case for successive trials which must necessarily be followed by successive refusals."

These cases, as does the dissenting opinion in the *Slocum* case, emphasize that the bases of the question, which lie deeper than the wording of the constitutional provisions involved, and rest upon the fundamentals of human right and of sovereign obligation, and further emphasize that no such right is invaded

and no such obligation shirked by denying the right of trial by jury where there is nothing for the jury to try. We respectfully ask, therefore, that the judgment of the Circuit Court of Appeals be affirmed.

Dated, San Francisco, California,
February 2, 1934.

BRANDENBURG & BRANDENBURG,
EDWIN C. BRANDENBURG,
HORACE W. B. SMITH,
GEORGE A. WORK,
Attorneys for Respondent.

Due service and receipt of a copy of the within is hereby admitted

this ..... *day of February, 1934.*

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Attorneys for Petitioner.

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CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1933

No. 578

ALICE ASCHENBRENNER,
Petitioner,
vs.
UNITED STATES FIDELITY & GUARANTY COMPANY,
Respondent.

RESPONDENT'S PETITION FOR A REHEARING.

BRANDENBURG & BRANDENBURG,
EDWIN C. BRANDENBURG,
National Savings & Trust Building, Washington, D. C.,
HORACE W. B. SMITH,
GEORGE A. WORK,
Mills Building, San Francisco, California,
Attorneys for Respondent and Petitioner.

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In the Supreme Court
OF THE
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October Term, 1933

No. 578

Alice Aschenbrenner,
Petitioner,

vs.

United States Fidelity & Guaranty Company,
Respondent.

RESPONDENT'S PETITION FOR A REHEARING.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The respondent respectfully asks the court for a rehearing for the following reasons:

The material provision of the policy involved here, providing for payment of the double indemnity, is as follows:

"If such injury is sustained by the insured (1) While a passenger in or on a public conveyance

(including the platform, steps, or running board thereof) provided by a common carrier for passenger service."

It is difficult to conceive how the company could have said more definitely, unambiguously, and explicitly, that the assured must be a passenger upon a public conveyance operated by a common carrier, than has the company said it in the quoted language, and to put it more concretely, how the assured could have been required in plainer language to have become a passenger on the train here, regardless of what position he occupied upon it. If the wording had been only "while a passenger", without further qualification, there might have been room for misconstruction. However, the qualification is definite and fixed that the assured must be a passenger upon a public conveyance provided by a common carrier for passenger service. It does extend, to be sure, the coverage to the assured while upon the platform, steps, or running board of the conveyance while a passenger, but to compel the payment of the double indemnity when the assured has not become a passenger, is to ignore a plain phrase in the condition, namely, "While a passenger". This phase of the controversy is aptly summed up in the language of the opinion of the Circuit Court of Appeals following:

> "The appellee insists that full force should be given to the words 'platform, steps, or running board.' In this contention, the appellee is quite correct. But equal force should be given to the words 'while a passenger.' If the appellee has not brought herself within *all* the conditions

> precedent to recovery under the policy, she cannot be awarded double indemnity."

This brings us, then, to the crucial point in the case, namely, what is the meaning of the word "passenger" as used in the policy, and to what rules shall recourse be had in order to determine the meaning? The Circuit Court of Appeals, by reason of the fact that the provision required the assured to be a passenger upon a passenger conveyance operated by a common carrier, had recourse to the law of carriers to determine the meaning. In doing this it followed what was practically the universal rule in this connection prior to the decision of the case at bar by this court. The cases cited by both the petitioner Aschenbrenner and the respondent supported this rule.

Cooley's Briefs on Insurance, 2nd Ed., Vol. 6, p. 5590;

Travelers Insurance Co. v. Austin, 42 S. E. 522;

Berliner v. Travelers Insurance Co., 121 Cal. 451;

Quinn v. National Life Insurance Co., 195 N. W. 427.

The test, as provided by the law applicable to carriers, is fixed and certain. It is a universal rule under that law that one who attempts to board a moving train, if otherwise qualified to become such, does not become a passenger until he reaches a place of safety upon it. The authorities are legion and the rule is practically without question.

Tompkins v. Portland R. R. Co., 77 Ore. 174; 150 Pac. 758;

Palmer v. Willamette Valley R. R. Co. (Ore.), 171 Pac. 1169;

White's Personal Injuries on Railroads, Vol. 2, Sections 556 and 783;
Trapnell v. Hines, 268 Fed. 504;
Illinois Central R. R. Co. v. Cotter (Ky. App.), 103 S. W. 279;
Kentucky Highlands R. C. Co. v. Creal (Ky. Sup.), 179 S. W. 417; L. R. A. 1916B 830;
Matthews v. Metropolitan Street R. R. Co., 137 S. W. 1003;
Schepers v. Union Depot R. R. Co. (Mo. Sup.), 29 S. W. 712;
Lee v. Baker (Tex. Civ. App.), 251 S. W. 580;
Schafer v. St. Louis and S. R. R. Co. (Mo. Sup.), 30 S. W. 331; 4 R. C. L. Sections 489, 490, 493;
Boyd v. Royal Indemnity Co., 166 N. E. 580;
Fay v. Etna Life Ins. Co., 187 S. W. 861;
Speaks v. Metropolitan R. R. Co., 166 S. W. 864.

To be sure, where the carrier is sued, there is the additional question of contributory negligence, between the parties, which is not involved here. But in those cases, the first question to answer before that of contributory negligence is reached is to determine the status of the plaintiff, namely, whether he is passenger, trespasser, licensee, etc. Those cases in which the decision was in favor of the carrier because of the contributory negligence of the plaintiff were not cited, because they had no bearing here, but those cases in which the decision was in favor of the carrier because the plaintiff had not become a passenger, are cited above. The court, in the case at bar, has cast this rule

in question, even where a carrier defendant is involved, by the following language:

> "but it is not clear that such cases turn on the existence or non-existence of the carrier passenger relationship" (citing *Atchison, Topeka, etc. v. Holloway*, 71 Kan. 1; 80 Pac. 31),

thus lending the great weight of its voice to sound a doubt upon the rule which heretofore has been deemed to be so well established as to be not open to question.

In the case at bar the court has declined to follow the rule laid down in the law of carriers, and has substituted no rule whatever in its stead. The crux of this matter appears in this language of the opinion:

> "We think the word 'passenger' cannot be restricted to the technical meaning assigned to it by the law of common carriers, for it also has a common or a popular meaning which would at least include the insured, who, with a ticket in his possession, was riding on the steps of the train."

The court nowhere states what the limitations are upon this popular conception, or what the popular definition is, except in so far as the latter language of the paragraph, shortly to be discussed, does this, and by this language a word which appears probably in tens of thousands of policies outstanding in this country has been accorded such an uncertain and nebulous significance as to require in each instance the decision of a court upon the facts presented before it can be said whether one is or is not a passenger within the meaning of the term. There is absolutely no way within the four corners of the opinion in this case to determine what the word passenger does mean.

There is no criterion furnished, nor in effect any rule stated which can be used as a measure of the meaning of this term, except the pleasure of the court which may be called upon to decide the case.

Following the language just quoted, the court says:

> "In its usual popular significance the term when applied to one riding a train indicates a traveler intending to be transported for hire or upon contract with the carrier, and distinguishes him from those employed to render service in connection with the journey." (Citing authorities.)

We have examined each of the cases cited, and none of them casts light upon the limitation to be placed upon this popular conception of which the court speaks.

The inference which the court indicates in the use of this language is that because the persons mentioned in the authorities cited in this connection were not passengers, that the assured was a passenger. How this conclusion is reached is not entirely clear. The court says that the popular significance of the term of one riding a train indicates a traveler intending to be transported for hire or upon contract with the carrier. That is an entirely new conception of the word "passenger". At what point does the relationship actually attach under such circumstances, and when one intends to be transported for hire, at what point must the intention ripen into reality? Suppose he intends to pay his fare but never does pay it. Suppose he intends to pay it but has not the means. He would be a passenger within the meaning of the definition adopted by the court. Suppose one should

jump on to the top of a train, and intend if he should be successful in getting from the top of the train to the inside of it to pay his fare. Would he be a passenger while riding on the top of the train? Suppose he should jump upon the blind baggage door and should ride there, intending at some future time, if possible, to go inside the train and pay his fare. Would he be a passenger while riding there? Suppose he were riding the brake beams, intending at some future time and place to leave the brake beams and go inside the car and pay his fare. Would he be a passenger while riding on the brake beams? The language which the court uses is clearly broad enough to include such persons within its scope, for the court says: "a traveler intending to be transported", and does not restrict the meaning to one who has actually entered into a contract, express or implied, to be transported. When the assured left his home on the morning that he was killed, he intended to become a passenger upon the train. Yet during the journey to the station in the taxicab, he cannot under any conception of the word be deemed to have been a passenger. It is obvious that under any view the person intending to become a passenger must have reached the point where he can and does avail himself of the facilities of the carrier for carrying passengers. In the law of carriers he must also conform to the conditions, express or implied, fixed by the carrier in addition to reaching the place. In the case at bar the court has held that he need not conform to those conditions. The question then arises, to what conditions must he conform? Does

he fix his own conditions? Does the law fix them? If so, what are they? At what point did the assured here attain the status of passenger? It is obvious even under a popular conception of the term, that there was a period when he was not a passenger, and at some instant of time, even under the court's view, the status attached. Was it when he commenced to run across the station platform to board a train then in motion? Was it when he got hold of the grab iron? Was it when his feet got onto the lower step? If so had he fallen instantly, he would have been under the court's view, a passenger. Did he acquire it at some point while he was traveling the twenty or thirty feet before he fell? It is clear from the authorities that he never acquired the status, from the standpoint of the law of carriers.

We mention these considerations to indicate how impossible it is to apply the ruling in this case as a guide for other cases. The elasticity of this definition is sufficient to include every person traveling upon a train in any capacity whatsoever, if he intends later to pay his fare, except those employed to render service in connection with the journey. It converts persons who have always been deemed to be trespassers into passengers, and, we respectfully submit, casts into the sea of uncertainty tens of thousands of policies of accident insurance now outstanding.

To be sure, if the word passenger is ambiguous and susceptible of different interpretations, the term must be considered most strongly against the insurer. But that presupposes an ambiguity. It presupposes that

the different interpretations of which the term is susceptible to be reasonable, and not so strained as to do violence to the meaning of the term. The interpretation placed upon the term by the court here is wholly unreasonable in that it extends the meaning to include persons who under any fair conception of the word are not passengers.

This court further states in this important paragraph in his opinion that "none of the standard dictionaries defines the term in a fashion suggesting that its meaning is to be limited in terms of the legal liability of the carrier". What these definitions are is not set forth. Funk & Wagnall's Standard Dictionary defines the word "passenger" as follows:

> "1. A person who travels in a public conveyance, as a railway car or steamship; one carried for fare by a common carrier."

The first part of this definition is broad enough, if carried to its logical conclusion, to include every person, including employees, licensees, trespassers, and what not, so long as they are traveling in a public conveyance. Webster's International Dictionary defines the term as follows:

> "1. A passer through or passer by wayfarer; traveler, now rare except in foot passenger.
>
> 2. A traveler by some established conveyance, as a coach, steamboat, railroad train, etc."

Other definitions follow in Webster's which have no bearing upon the question here. Of this definition the same can be said that has been said of the standard

dictionary definition. A trespasser, a bare licensee, an employee, in fact anyone traveling by some "established conveyance", regardless of his relation to the operation of the conveyance, all are included within it.

If it is the purpose of the court in the present case to adopt the dictionary definition of the word "passenger" as used in this policy, then we believe that the opinion should be modified so as to relieve this question of all uncertainty. The decision then would stand as clear authority for the proposition that the dictionary definition in construing this term is the one endorsed by the court. As the opinion now stands the term "passenger" is somewhere in the uncertain zone between the definition accorded the word "passenger" in the law of carriers, and the broad dictionary definition alluded to by the court, because the court, in the earlier part of the paragraph discussed carves out of the broad dictionary definition persons otherwise within this definition, namely those employed to render service in connection with the journey, but otherwise does not narrow the scope of the definition. In other words, the court has apparently adopted a new definition of the term "passenger", broader than that given to it in the law of carriers, narrower than that given to it in the dictionaries, and yet has itself not defined the term save to say that it is neither the one nor the other. We respectfully submit that this in effect leaves the term without meaning, and with the criterion repudiated by the court by which the meaning has heretofore been determined, leaves no way for its meaning to be determined.

We respectfully ask, therefore, that this court grant a rehearing in the court, to reconsider the effect of its ruling.

Dated, San Francisco, California,
May 7, 1934.

BRANDENBURG & BRANDENBURG,
EDWIN C. BRANDENBURG,
HORACE W. B. SMITH,
GEORGE A. WORK,
Attorneys for Respondent and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for respondent and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
May 7, 1934.

GEORGE A. WORK,
Of Counsel for Respondent and Petitioner.

Due service and receipt of a copy of the within is hereby admitted

this ..... *day of May, 1934.*

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Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 578.—October Term, 1933.

Alice Aschenbrenner, Petitioner, *vs.* United States Fidelity & Guaranty Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 2, 1934.]

Mr. Justice Stone delivered the opinion of the Court.

Petitioner, a beneficiary of a policy of accident insurance issued to her husband by respondent, brought this suit in the District Court for Northern California to recover under the double indemnity provisions of the policy. At the trial liability was conceded for the single amount stipulated to be paid in the event of the insured's death by accident, but double liability was contested on the ground that the insured, at the time of the accident, was not a passenger on a common carrier within the meaning of the double indemnity provisions of the policy. A judgment entered upon a verdict for the petitioner for the double liability was reversed by the Court of Appeals for the Ninth Circuit, which directed that judgment be reduced by one-half. 65 F. (2d) 976. Certiorari was granted, — U. S. —, to resolve an alleged conflict of the decision below with those in other circuits. See *London Guarantee & Accident Company* v. *Ladd*; *Preferred Accident Insurance Co. of New York* v. *Ladd*, 299 Fed. 562, 565 (C. C. A. 6th); *Aetna Life Insurance Co.* v. *Davis*, 191 Fed. 343 (C. C. A. 8th); *Preferred Accident Insurance Co. of New York* v. *Muir*, 426 Fed. 926 (C. C. A. 3d); compare *Fidelity & Casualty Co. of New York* v. *Morrison*, 129 Ill. App. 360.

The policy provided for payment of a specified amount in case of loss of life of the insured resulting from accidental bodily injury and for payment of double that amount "if such injury is sustained by the insured (1) while a passenger in or on a public conveyance (including the platform, steps or running board thereof) provided by a common carrier for passenger service". The insured, who had

in his possession a ticket entitling him to transportation, arrived at the railroad station platform just as the train started to move out of the station. There was testimony from which the jury might have found that, while the train was moving at a speed of seven to ten miles an hour but was still within the station and opposite the platform, with vestibule doors open, the insured jumped onto the lower step of a car, his hand grasping the handrail, and that he continued for a brief time, while the train moved about twenty feet, to stand with both feet upon the step but with a small part of his body or clothing projecting beyond or outside the vestibule until it brushed against a bystander on the platform in a manner causing the insured to lose his hold and fall to his death.

The trial judge instructed the jury that if the insured held a ticket entitling him to ride as a passenger, and in attempting to board the train while in motion he stood with both feet upon the step, he was a passenger and entitled to recover under the double indemnity clause. The only question which it is necessary to decide here is whether the insured was a "passenger" at the time of the accident within the meaning of the policy. The Court of Appeals ruled that he was not; it reached this conclusion by applying the term as it was said to be defined in the law of common carriers.

In personal injury suits against common carriers, brought by persons who, intending to be passengers, were injured while endeavoring to mount the steps of a moving train, courts have sometimes said that the implied invitation to board the train is withdrawn when it begins to move and that the duty of the carrier to exercise a high degree of care toward its passengers does not attach in such circumstances because one seeking to board a moving train does not become a passenger until he reaches a place of safety. *Trapnell* v. *Hines*, 268 Fed. 504, 506; *Illinois Central R. R.* v. *Cotter*, 31 Ky. Law Rep. 679; *Kentucky Highlands R. Co.* v. *Creal*, 166 Ky. 469; *Mathews* v. *Metropolitan Street Ry. Co.*, 156 Mo. App. 715; *Schepers* v. *Union Depot R. Co.*, 126 Mo. 665, 675; *Tompkins* v. *Portland Ry. Co.*, 77 Ore. 174, 179; *Palmer* v. *Willamette Valley Southern Ry. Co.*, 88 Ore. 322, 330. The Court of Appeals thought that the evidence here would have made no case for the jury in a suit against the carrier, and therefore concluded that the trial judge should have directed a verdict for the insurer on the issue of double indemnity.

No doubt intending passengers who are injured in attempting to board a moving train, unless they were invited to do so, are not usually entitled to recover from the carrier. But it is not clear that such cases turn on the existence or non-existence of the passenger-carrier relationship. See *Atchison, Topeka & Santa Fe Ry. Co.* v. *Holloway*, 7d Kan. 1. It has often been recognized that the relationship of carrier and passenger may arise and the duty of the carrier to the passenger attach when the latter comes upon the station platform and before boarding the train. See *Warner* v. *Baltimore & Ohio R. R. Co.*, 168 U. S. 339; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Holloway*, *supra*; *Wabash, St. Louis & P. R. Co.* v. *Rector*, 104 Ill. 296; *Chicago & E. I. R. Co.* v. *Jennings*, 190 Ill. 478, 483; Michie, Carriers (1915), §§ 2126, *et seq.* Yet the negligence of a passenger in going into a known place of danger without the inducement or invitation of the carrier may bar his recovery for the resulting injury, even though the passenger-carrier relationship has begun and continues. See *Warner* v. *Baltimore & Ohio R. R. Co.*, *supra*; *Daley* v. *Boston, Revere Beach & L. R. Co.*, 241 Mass. 78. And in the case of the insured, who had come upon the station platform intending to be a passenger, it may be that negligence in jumping uninvited onto the moving train would bar his recovery from the carrier without resort to the artificial assumption of a hiatus in that relationship during the brief interval required for boarding the train. The notion of such a suspension of the passenger-carrier relationship has been rejected in allowing recovery upon policies insuring against injury while travelling as a "passenger" on a railway train, both where the passenger alighted from the train at an intermediate stop and was injured in attempting to return to the train after it started to move again, *Wharton* v. *New York Life Insurance Co.*, 178 N. C. 135, 138, and where the insured, in beginning his journey, was injured in attempting to board a moving train. *Fidelity & Casualty Co. of New York* v. *Morrison*, 129 Ill. App. 360.

But it is unnecessary here to follow the niceties of legal reasoning and terminology applied in negligence suits against common carriers, for we are interpreting a contract and are concerned only with the sense in which its words were used. *Farber* v. *Mutual Life Ins. Co. of New York*, 250 Mass. 250, 254; *Boyd* v. *The Royal Indemnity Co.*, 120 Oh. St. 515, 517. The phraseology of contracts of insurance is that chosen by the insurer and the contract in fixed

form is tendered to the prospective policy holder who is often without technical training, and who rarely accepts it with a lawyer at his elbow. So if its language is reasonably open to two constructions, that more favorable to the insured will be adopted, *Stipcich* v. *Metropolitan Life Insurance Co.*, 277 U. S. 311, 322; *Mutual Insurance Co.* v. *Hurni*, 263 U. S. 167, 174; and unless it is obvious that the words are intended to be used in their technical connotation they will be given the meaning that common speech imports. *Neighbors* v. *Life & Casualty Ins. Co.*, 182 Ark. 356; *Tupper* v. *Massachusetts Bonding & Ins. Co.*, 156 Minn. 65; *Anderson* v. *Fidelity & Casualty Co.*, 228 N. Y. 475, 483.

We think the word "passenger" can not be restricted to the technical meaning which may be assigned to it by the law of common carriers, for it also has a common or popular meaning which would at least include the insured who, with a ticket in his possession, was riding on the steps of the train. In its usual popular significance the term, when applied to one riding a train, indicates a traveller, intending to be transported for hire or upon contract with the carrier, and distinguishes him from those employed to render service in connection with the journey. See *Wood* v. *General Accident Insurance Co. of Phila.*, 160 Fed. 926; *Travelers Insurance Co.* v. *Austin*, 116 Ga. 264; *Ward* v. *North American Accident Insurance Co.*, 182 Ill. App. 317; compare *Continental Life Ins. Co.* v. *Newman*, 219 Ala. 311; *United States Casualty Co.* v. *Ellison*, 65 Colo. 252. None of the standard dictionaries defines the term in a fashion suggesting that its meaning is to be limited in terms of the legal liability of the carrier. While for the purposes of judicial decision dictionary definitions often are not controlling, they are at least persuasive that meanings which they do not embrace are not common.

That the stipulation to be construed is one for double indemnity calls for no different conclusion. It has been argued that such a provision contemplates a risk which is comparatively slight and that therefore it should be strictly construed. It may be that the insurer assumes little additional risk; but the terms of the clause disclose an inducement to insure set forth in attractive detail.[1] The

[1] Discussion of the double indemnity provisions from the standpoint of risk and sales value may be found in Sommer, Manual of Accident and Health Insurance, 16, 84 et seq.; Hutcheson, Note on Double Indemnity Clauses, 19 Transactions, Actuarial Society of America 332.

policy contains no exceptions exempting the insurer from liability if the injury is caused by negligence of the insured, or restricting the liability to accidents occurring only after a point of safety has been reached, and the steps of a car are specifically included in the place where injury insured against may occur. Nothing in the policy gives any hint that words in this clause are used more narrowly than those in any other. The insurer has chosen the terms; and it must be held to their full measure in this clause, as in any other, whether its promise be for more or less. *London Guarantee & Accident Co. v. Ladd*, 299 Fed. 562, 564; *Cedergren v. Massachusetts Bonding & Ins. Co.*, 292 Fed. 5, 8; *Dolge v. Commercial Casualty Ins. Co.*, 211 App. Div. 112; *Stewart v. North American Acc. Ins. Co.*, 33 S. W. (2d) 1005 (Mo. App.).

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.